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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1177

UNITED STATES OF AMERICA,
Respondent,

v.

JOHN B. SWAINSON,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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John B. Swainson, the Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above captioned case on January 31, 1977.

CITATIONS TO OPINIONS BELOW

The District Court's Judgment is not reported. However, its Opinion denying Petitioner's Post-Trial Motions, also unreported, is found in Appendix "A" hereto, *infra*. The Opinion of the Circuit Court of Appeals is currently unreported. Thus, it is fully set out in Appendix "B", *infra*, at 34-46.

JURISDICTION

The Judgment of the Circuit Court of Appeals for the Sixth Circuit was entered on January 31, 1977 (see Appendix "B" at p. 34). In light of that Opinion, Petitioner did not request rehearing before the Sixth Circuit. The jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED

I. Whether a person indicted for Perjury before a Federal Grand Jury is properly charged with violating 18 USC §1621 as opposed to 18 USC §1623?

II. Whether the deliberate delay of thirty-two (32) months between the completion of the investigation and the return of the instant indictment, coupled with the death of Chief Justice T.M. Kavanagh (of the Michigan Supreme Court) was prejudicial to Petitioner thereby denying him the right to assert a full defense and abridging Petitioner's right to Due Process of Law?

III. Whether the admission of substantial hearsay at trial denied the Petitioner his full right of confrontation?

STATUTES INVOLVED

The statutory provisions involved are 18 USC §§1621, 1623. They are reproduced in Appendix "A", *infra*, at pp. 32, 33.

STATEMENT OF THE CASE

(All numbers in parentheses refer to corresponding pages of the Transcript.)

John B. Swainson, the Defendant and Appellant herein, appeared before the United States Grand Jury in the Eastern District of Michigan, Southern Division, on May 19, 1975, and May 21, 1975. Subsequent to his appearance before the Grand Jury Defendant Swainson was indicted on July 3, 1975, along with Harvey Wish and Charles Goldfarb in a Nine Count Indictment (48-62). Upon appropriate motion Defendant Goldfarb was severed from Defendants Swainson and Wish because of the inability of Defendant Goldfarb's counsel to attend the trial. The case then proceeded with only two Defendants.

All of the United States District Judges for the Eastern District of Michigan, Southern Division, disqualified themselves from hearing this case. On or about July 16, 1975, the Honorable Harry Phillips, Chief Judge, United States Court of Appeals for the Sixth Circuit, appointed the Honorable Carl B. Rubin, United States District Judge for the Southern District of Ohio, to sit as a District Judge in the Eastern District of Michigan, Southern Division, for the period beginning July 14, 1975 and ending December 31, 1975, "and for such additional time in advance thereof to prepare for trial of cases."

Certain pre-trial motions were filed with Judge Rubin by Defendant Swainson. On October 6, 1975, Judge Rubin denied all pre-trial motions filed by Defendants and the matter proceeded to trial.

Trial began on October 20, 1975. The instant Indictment charged Defendant Swainson as follows: Count I charged Defendant Swainson of violation of the so-called Travel Act (18 USC 1952); Count II charged Defendant Swainson with alleged Mail Fraud in violation of 18 USC §1341; Count III charged Defendant Swainson with alleged Mail Fraud in violation of 18 USC §1341; Counts IV, V and VI charged Defendant Swainson with Perjury in violation of 18 USC §1621; Defendant Swainson was not charged in Counts VII and VIII of the Indictment but he was in Count IX. The charge in Count IX was Conspiracy to Commit Bribery in violation of 18 USC §371 (57-62).

On October 29, 1975, Judge Rubin granted Defendant Swainson's Motion for Judgment of Acquittal as to Counts I, II and III. Swainson's Motion for Judgment of Acquittal as to Counts IV, V, VI, and IX was denied by Judge Rubin (R. 1541-1542) and were submitted to the jury on October 2, 1975. The jury returned its verdict finding Defendant Swainson guilty of Counts IV, V, and VI (Perjury), but not guilty of Count IX (Conspiracy to Commit Bribery). Nine post-trial motions for judgment of acquittal subsequent to jury verdict or motions for new trial were filed but on January 26, 1976, Judge Rubin overruled each and every motion of Defendant Swainson (25-31). On January 27, 1976, Judge Rubin sentenced John Swainson to the custody of the Attorney General for a year and a day on Count IV of the Indictment, a year and a day on Count V of the Indictment, and a year and a day on Count VI of the Indictment, all of said

sentences to be served concurrently. In addition, Judge Rubin ordered that Defendant Swainson be confined for a period of sixty (60) days and that execution of the remainder of each year and a day sentence be suspended and that Defendant Swainson be placed on unsupervised probation for the balance of that period. Bond was continued pending appeal.

On October 20, 1975, a jury trial began in the case of the *United States of America* v *John B. Swainson*. Defendant Swainson was charged by Grand Jury Indictment of Seven Counts of alleged impropriety (47-62). The District Court had, on October 6, 1975, denied each and every one of Swainson's pre-trial motions. On September 11, 1975, Swainson filed a list of possible witnesses who would appear on his behalf and that list was supplemented on October 2, 1975. Moreover, on October 17, 1975, a list of possible exhibits which would be used on behalf of Defendant Swainson was likewise filed.

The first witness to appear on behalf of the Government was the Honorable Thomas Giles Kavanagh, Chief Justice of the Michigan Supreme Court (R. 171 *et seq*). The Chief Justice testified essentially as to the workings and machinations of Michigan appellate procedure with specific reference to the interworkings of the Supreme Court when application for leave to appeal and appellate motions are filed. He gave a detailed, concise and effective summary of appellate practice in the Supreme Court of Michigan.

The second witness offered by the Government was one C. Robert Langford, a Special Agent of the Federal Bureau of Investigation (R. 332 *et seq*). Langford testified to various surveillances that he and his brother agents

conducted on (then) Associate Justice John B. Swainson of the Michigan Supreme Court. Furthermore, Langford partially laid the foundation for certain government transcripts which were admitted into evidence over strenuous, zealous and repeated objection by defense counsel (*e.g.* R. 75-84). Moreover, Langford testified that when Swainson was under surveillance on one specific date, he was followed to Switzer's Restaurant where he was observed going inside. Furthermore, the testimony indicated that when Harvey Wish, the co-defendant herein, arrived at Switzer's, instructions had been left with the parking lot attendant, one Melvin Holloway, to transfer a large box that looked like it contained a television set from Wish's car to Swainson's car (R. 1041-46).

Edmund Diem, a Special Agent of the FBI, was the third witness. While Diem was on the stand the United States Attorney had him identify, and the Government then introduced, several tape recordings which allegedly contained the voices of co-defendant Harvey Wish and unindicted co-conspirator John J. Whalen. It is to be noted that nowhere on the entire tape recording does John B. Swainson's voice appear nor does the Government so claim.

Melvin Holloway testified that he was the parking lot attendant at Switzer's Restaurant in Detroit, Michigan, and that on or about the fifteenth day of October, 1973, John B. Swainson drove to Switzer's Restaurant (R. 1041-46). Holloway testified that Swainson exited his vehicle and told the parking lot attendant that a car would soon arrive and that Swainson would appreciate Holloway transferring the box in that vehicle into Swainson's. Holloway testified that Wish subsequently arrived at Switzer's Restaurant and that Holloway

and Wish moved a large box which looked like it contained a television set from Wish's vehicle to Swainson's (R. 1043-45). Wish then entered Switzer's Restaurant.

John J. Whalen, an unindicted co-conspirator was the next witness for the Government (R. 1070 *et seq*). Whalen testified that Wish told him that he (Wish) had a "man" on the Supreme Court and that for $30,000.00 that judicial officer could be bribed in order that favorable action be shown to Whalen's then pending State appeal. Whalen never met Swainson nor could he testify that Swainson's voice was on the tape recordings. Eventually, after Whalen's application for leave to appeal had been denied by the Michigan Supreme Court that Court, *sua sponte*, granted Whalen's application for reconsideration for leave to appeal and subsequently allowed him to remain free on bond pending appeal. Whalen's conviction was ultimately reversed by the Michigan Supreme Court and remanded for new trial.

A stipulation was then entered into regarding certain facts which, *inter alia*, illustrated that on diverse dates certain telephone calls had been made from co-defendant Harvey Wish's phone to either John Swainson's home phone or John Swainson's office in Ann Arbor, Michigan, or John Swainson's home in Manchester, Michigan (R. 1317-1319). There was no competent testimony in the Government's case in chief which indicated who the speaker was on Swainson's telephone.

The Honorable Thomas E. Brennan, Associate Justice of the Michigan Supreme Court was the next witness to testify (R. 1368 *et seq*). Brennan testified that John Swainson had never put any inappropriate or improper pressure upon him, nor had Justice Swainson attempted

to influence his vote in the Michigan Supreme Court's decision of *People* v *Whalen* (R. 1371-73). That same testimony was offered by the Honorable G. Mennen Williams (R. 1437), the Honorable Charles Levin (R. 1457-58), and the Honorable Mary E. Coleman (R. 1468), all of whom were Associate Justices of the Michigan Supreme Court.

Eleanor Cowan was the next witness offered by the defense. Miss Cowan testified that she had been the last secretary to the (deceased) Chief Justice of the Michigan Supreme Court, Thomas M. Kavanagh (R. 1472). Miss Cowen testified that the late Chief Justice would be the only person who would know why he put Whalen on the Court's nonagenda list for consideration (R. 1484). Thomas M. Kavanagh died in April, 1975, before John B. Swainson was even indicted.

One E. David Auer followed Miss Cowen to the stand (R. 1543 *et seq*). Mr. Auer testified that he had purchased, as a gift, a television set for his close friend, John B. Swainson (R. 1547-48), and that the television set had been delivered from Auer to Swainson by Harvey Wish. That testimony was corroborated entirely by one John Kalkanian (R. 1559 *et seq*).

John B. Swainson was the last witness to testify on behalf of the defense (R. 1596 *et seq*). Swainson denied that he had willfully committed perjury before the Grand Jury and testified that he had never spoken to anyone in an attempt to improperly influence any Justice of the Michigan Supreme Court (nor anyone else) to act favorably on John Whalen's appeal.

After Swainson's testimony defense counsel brought to the trial court's attention some alleged jury misconduct on the part of one Barbara Ramsey, Juror Number Six (R. 1861-68). Although defense counsel raised this issue

at the first appropriate time, and although defense offered live witnesses to attempt to substantiate the allegations of jury misconduct, Judge Rubin denied same without a hearing (R. 1868).

Mr. Robert C. Ozer, Special Attorney for the Detroit Strike Force then gave his closing argument, as well as his rebuttal closing argument. This shows that he requested that the jury believe the contents of certain tape recordings that had been admitted into evidence (R. 1730-47). After Mr. Ozer's rebuttal argument, Judge Rubin charged the jury (R. 1797) and eventually the jury returned a verdict of Guilty as to Counts IV, V and VI and Not Guilty as to Count IX (R. 1935).

Defendant John B. Swainson then filed nine post-trial motions requesting judgment of acquittal subsequent to jury verdict or, in the alternative, granting of all motions, and, on January 26, 1976, Judge Rubin entered an order denying all of Defendant Swainson's post-trial motions.

On January 26, 1976, Judge Rubin sentenced Defendant Swainson to serve a year and one day on Counts IV, V and VI, said sentences to be served concurrently. Judge Rubin suspended all but 60 days of Defendant Swainson's sentence and ordered the rest to be served in an unsupervised probation.

Swainson appealed the convictions to the United States Court of Appeals for the Sixth Circuit. On January 31, 1977, that Court, in an opinion by Judge Pierce Lively, affirmed the District Court judgment.

REASONS FOR GRANTING THE WRIT

1. This case (Issue No. I) presents a serious question of statutory construction regarding the applicable Perjury statute [18 USC §1621 *or* 18 USC §1623] to be utilized in prosecuting one who intentionally prevaricates before a Grand Jury. 18 USC §1623 gives one who perjures himself before a Grand Jury the right to escape prosecution if, under certain circumstances, he recants. This salutory concept is not found in §1621. The proper functioning of a Federal Grand Jury is too important to the Criminal Justice system to permit ambiguity as to which statute applies in Perjury committed before a Federal Grand Jury.

This appears to be a question of first impression. Some of the Circuits have decided other matters arising from §1623 Perjury prosecutions [e.g., *United States v. Del Toro*, 513 F 2d 656 (2d Cir., 1975); *United States v. Lardieri*, 506 F 2d 319 (3d Cir., 1974). By dicta, however, the Second Circuit, in *United States v. Kahn*, 472 F 2d 272, 283 (2d Cir., 1973), has carefully identified the problems which arise in cases such as this since it has not been authoritatively settled whether 18 USC §1623 is the sole congressional enactment which obtains for alleged perjury before a Grand Jury.

Petitioner respectfully suggests that the problem hypothetically posed in *Kahn* is here present. Swainson went before a United States Grand Jury in Detroit on May 19, 1975 (see Indictment).* While before the Grand Jury, Petitioner was confronted by the sworn testimony of FBI Agent Edmund Diem and one Melvin Holloway (see Appendix "C" at 92-98). When Swainson requested

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* For convenience, the Petitioner's May 19, 1975 Grand Jury testimony is reproduced as Appendix "C".

that he be excused to consult with his lawyer, the Government agreed and the Grand Jury *adjourned* until May 21, 1977*.

When Swainson returned to the Grand Jury on May 21, 1975, he admitted that his May 19, 1975 testimony was erroneous (Appendix "D" at 103-05). Thereupon he corrected his May 19, 1975 testimony (104) but asserted his Fifth Amendment privilege to subsequent questions (Appendix "D" at 105).

18 USC §1623 has two conditions precedent before the recantation provision [18 USC §1623(d)] becomes operative:

> (1) At the time that the person makes his admission, the alleged perjurious statement must not have substantially affected the proceeding; and,
>
> (2) It must not be manifest that the falsity "has been or will be exposed."

As to the first condition, it cannot be argued that Swainson's alleged Perjury substantially affected the Grand Jury proceeding. Since the Grand Jury was *in recess* during the two day stipulated adjournment, it is clear that Petitioner's May 19, 1975 statements did not affect any Grand Jury proceeding.

Whether on May 19, 1975 it had become manifest that Petitioner's alleged falsity had been or would be exposed admittedly presents a much more difficult hurdle for Petitioner to overcome. But even if one assumes that the testimony of Agent Diem and Mr. Holloway exposed totally Swainson's alleged prevarication, it was still inappropriate for the Government to select that statute

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* Petitioner's May 21, 1975 Grand Jury testimony is reproduced in Appendix "D".

which gives Swainson the least protection. Whether Swainson "recanted" is *not* a question addressed to the vagaries of the Executive Branch. This determination is one of fact and not Prosecutorial fiat. It should be determined by the jury unless the District Judge can say that no reasonable man could fail to conclude that Swainson did not recant within the meaning of §1623(d). On this record Petitioner respectfully submits that such cannot be conclusively stated.

Based upon the well-settled rules of statutory construction, it appears plain that 18 USC §1623 is the exclusive statute for alleged Perjury before a Federal Grand Jury. §1621 is both an earlier and more general Congressional promulgation. It treats any person "having taken an oath before a *competent tribunal, officer, or person* . . . ." (emphasis supplied), while §1623, by its own language, obtains as to any person "under oath in any proceeding *before* or *ancillary* to any *court* or *grand jury* . . . ." (emphasis supplied). It is thus quite clear that §1623 is a more particularized enactment than is §1621 — the general Perjury statute. This Court's decisions establish the unchallengeable legal proposition that a statute aimed at specific conduct prevails over an otherwise applicable general statute. *Kepner v. United States*, 195 US 100, 125 (1904); *Ginsberg & Sons, Inc. v. Popkin*, 285 US 204, 208 (1931); *Mac Evory v. United States*, 322 US 102, 107 (1943); *Fourco Glass Company v. Transmirra Products Corp*, 353 US 222, 228-29 (1957); *Bulova Watch Company v. United States*, 365 US 753, 758 (1961). Juxtaposed against this mandatory rule of statutory construction, Petitioner respectfully submits that certiorari should issue in order that this Court authoritatively construe 18 USC §1623. Since indictment by a Grand Jury is guaranteed by the Fifth Amendment,

the importance of which Perjury statute is to be utilized against one whom allegedly lies before a Grand Jury is obvious. Need for uniformity is critical and only this Court can establish nationwide rules.

Petitioner respectfully submits that this question satisfies Rule 19, §1(B) of the Rules of the Supreme Court. This question of statutory construction is vitally important to the Federal Criminal Justice system and is deserving of this court's consideration.

2. This case (Issue No. II) presents a serious question of constitutional law as to pre-indictment delay and one which has received divergent answers in the various Courts of Appeals.

A.

At trial, defense counsel questioned FBI Agent Edmund Diem as to why the investigation leading up to the instant indictment was held in abeyance from approximately October, 1972, until May, 1975. This explanation was as follows:

> "Q. (By Mr. Kohl) And at or about that time, and when I say that time, I am referring to the time around October of 1972, did you make any investigation as to the procedures followed by the Supreme Court in how they do or do not grant leave to appeal?
>
> "A. No, sir.
>
> "Q. Did you on or about October of 1972 make any investigation to determine how the Court, the Michigan Supreme Court was actually conducted, the mechanics of how it operated?
>
> "A. No.

"Q. May I ask, Mr. Diem, that in view of the investigation that had been conducted up through, we will say, October of 1972 with the surveillances that had been conducted, with the recordings that had been recorded, why didn't you or the FBI if I may use that term go to Chief Justice Kavanagh and make inquiry of him as to whether John Swainson had attempted to influence the Court in connection with the case of People versus Whalen?

"A. We were involved in an active investigation. We realized that Justice Swainson had great influence and political connections in this state, and we were concerned that if we revealed our ongoing investigation, that we would disclose what was going on and that would be the end of it.

"Q. Let me ask you this question: Was not the primary concern of your investigation to determine whether John Swainson did or did not attempt to influence the other members of the Supreme Court to accept Whalen's case?

"A. That's correct.

"Q. Well, in your judgment, what better way was there to, in fact, find out of John Swainson did attempt to influence other members of the Court other than by going to the members of the Court themselves and inquiring not in 1975 but contemporaneously with the time that this event is alleged to have occurred?" (R 905-07)

B.

Defendant Swainson brought a pre-trial Motion to Dismiss because of alleged pre-indictment delay. It was denied by the District Court. The Sixth Circuit, relying

upon *United States v. Marion*, 404 US 307 (1971), and *Dillingham v. United States*, 423 US 64 (1975), noted that the Sixth Amendment's speedy trial provision has no application prior to actual arrest or indictment. Citing *Marion* as well as its own decisions [*United States v. Giacalone*, 477 F 2d 1273 (6th Cir., 1973); *United States v. Alred*, 513 F 2d 330 (6th Cir., 1975)], the Court did state that "If a Defendant can show actual substantial prejudice to his right to a fair trial and that the delay was deliberately created to gain an unfair tactual advantage for the government, he is entitled to dismissal for violation of Fifth Amendment due process rights." See Appendix "B", *infra*, at 43-44.

To Defendant's argument on this issue, the Court of Appeals additionally said:

> "Appellant has failed to show that any delay in presenting this case to the grand jury was intentional and designed to gain a tactical advantage. Furthermore, his claim of actual prejudice rests on the death before trial of a former chief justice of the Supreme Court of Michigan, the only witness who could have explained the way in which that court handled the Whalen appeal. This argument overlooks the fact that appellant was acquitted on the conspiracy charge and all substantive charges involving the alleged bribery scheme. The deceased witness could not possibly have furnished a defense to the perjury charges. The indictment was returned less than two months after appellant's grand jury appearances upon which the perjury charges were based. There simply was no unreasonable delay in seeking the indictment for perjury."
>
> (Appendix "B", at 44.)

Petitioner respectfully submits that the Court of Appeals erred. One of the reasons for prohibiting pre-indictment delay is to limit "the possibilities that long delay will impair the ability of the accused to defend himself because of faded memories." *United States v. Marion, supra*, at 331 (concurring opinion). Petitioner believes that the Sixth Circuit was wrong when it failed to recognize that since Petitioner appeared before the Grand Jury on May 19 and 21, 1975, and since trial began in October, 1975, the delay was not unusually severe nor prejudicial. What the Sixth Circuit failed to consider was that in his May, 1975 appearances before the Grand Jury, Swainson was asked questions treating subject matter *several years* old. It was just as damaging to indict Swainson in 1975 for Perjury on Counts treating 1972 subject matter as it would have been to indict him for substantive criminal offenses allegedly committed in 1972. The paramount factor is prejudice to the Defendant. Here Swainson was asked specific questions regarding, for example, speaking with one Harvey Wish, his Co-Defendant, *on specific dates*. (Appendix "C", *infra*, at 69, 71.) In general, he said that he could not remember the transactions about which he was asked since they occurred two and one-half years prior to his appearance before the Grand Jury. Petitioner thinks that questions regarding specific and very brief telephone conversations occurring between he and Co-Defendant Wish on specific dates in 1972 is not the kind of recollection that etches itself forever on one's memory. It cannot be said that if Swainson had appeared before the Grand Jury in 1972 or 1973 (when his memory was obviously much fresher) that his answers would have been the same. It is submitted that the Sixth Circuit's disposition of this issue was palpably erroneous.

C.

In treating this issue the Court of Appeals said that two conditions are necessary in the Sixth Circuit before a Defendant may have relief due to oppressive pre-indictment delay. These two factors are:

(1) Substantial prejudice; and,

(2) Deliberate delay to gain a tactical advantage for the government.

(See Appendix "B" at 43-44.)

This holding is significant because as Petitioner reads *United States v. Barket*, 530 F 2d 189, 196 (8th Cir., 1976), if a Defendant can meet *either* of the two conditions in the Eighth Circuit he may obtain judicial relief. It is thus apparent that the Sixth Circuit and the Eighth Circuit are in disagreement as to the showing required by an accused before he may prevail on alleged pre-indictment delay.

The Court has said that one of the considerations for exercising certiorari jurisdiction is a split of authority in the Circuit Courts of Appeals. *Wilkinson v. United States*, 365 US 399 (1961); *Bruning v. United States*, 376 US 358 (1964); *United States v. Muniz*, 374 US 150 (1963); *Magnum Import Co. v. Coty*, 262 US 159 (1925). Moreover, Petitioner submits that a split in the circuits on this point endows this Petition with the "special and important" characteristics set forth in Rule 19 and *Rice v. Sioux City Cemetery*, 349 US 70 (1954).

This Petition for Certiorari should be granted in order to settle this re-occurring yet troublesome Constitutional question.

3. The erroneous admission into evidence of voluminous hearsay offered under the so-called Federal conspiracy hearsay exception denied petitioner his constitutionally guaranteed right of confrontation.

A.

During trial, approximately one-half of the Government's evidence constituted tape recordings of various conversations between Co-Defendant Harvey Wish and government informer [and unindicted conspirator] John Whalen. *Neither Swainson's name nor voice appeared on the tape recordings played to the jury.* Defendant's repeated objections to this "evidence" (See, e.g., R. 75-84, 299-329, 454, 508-09, 1076-1078, 1262) were overruled and the jury ultimately was allowed to consider the tapes as probative evidence of Swainson's guilt. While the jury acquitted Petitioner of complicity in the alleged conspiracy to commit bribery (Count IX), the tape recordings themselves were damning as to the Perjury charges and the Prosecutor consistently relied upon the alleged truth contained therein when arguing Petitioner's guilt (R 1730-1747, 1753, 1788-89, 1792-95).

This hearsay could only be admitted (if at all) pursuant to the Federal Hearsay Conspiracy exception. Federal Rules of Evidence, 801 (d) (2) (E); *Dutton v. Evans*, 400 US 74 (1970).

The tape recordings introduced Co-Defendant Harvey Wish's conversations with John Whalen to the jury. These tape recordings *seriatim* contained damning statements from the mouth of Co-Defendant Wish which improperly implicated Petitioner in the *Perjury charges* as well as the Conspiracy to Commit Bribery allegation. Co-Defendant Harvey Wish did not choose to testify at

trial and Swainson, therefore, did not have the opportunity to cross-examine his chief "accuser."*

If the tape recordings had not been utilized it can be said with certainty that at best there exists only marginal evidence of Petitioner's guilt. For a good example of this phenomenon Petitioner respectfully directs the Court to Count IV of the indictment juxtaposed against the following portions of the record: R. 1112, 1115, 1116, 647-651, 661-65, 671-679, 689-92, 695-96, 718-723, 730, 742-44, 750, 1104, 1106-07, 1109, 1124.

B.

To Petitioner's argument that the procedure utilized by the District Court in admitting, over Swainson's objection, the tape recordings was violative of Petitioner's Constitutional right of confrontation as to non-testifying Co-Defendant Harvey Wish [*Bruton v. United States*, 391 US 123 (1968)], the Court of Appeals apparently found a waiver in the fact that Petitioner, prior to trial, had *not* moved for a separate trial pursuant to F. R. Crim. P. 12 (b) (5). The Court of Appeals did *not* cite one of this Court's decisions in support of its holding, and diligent research by Petitioner has failed to find such a precedent. Indeed this Court has clearly held that waiver of a constitutional right is not favored, that waiver of such a right cannot be based upon a silent record (as here) and that waiver ought to be judicially construed by its definition — the intentional and knowledgeable relinquishment of a known right. *Johnson v. Zerbst*, 308 US 458 (1938); *Carnley v. Cochran*, 369 US 506 (1962).

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* A review of all the evidence clearly illustrates that the majority of the testimony implicating Petitioner in *all* criminal charges was offered by Co-Defendant Harvey Wish via his voice on the tapes.

Recent decisions of this Court plainly emphasize the importance of a criminal defendant's constitutionally guaranteed right of confrontation and refuse to find waiver in a silent record. *Brookhart v. Janis*, 384 US 1, 4-6 (1966); *Barber v. Page*, 390 US 719, 725-26 (1968); *Boykin v. Alabama*, 395 US 238, 243 (1969). Petitioner respectfully suggests that it is inappropriate on this record to infer a proper waiver of Petitioner's right of confrontation.

C.

Another meritorious sub-issue of the hearsay question is present. Assuming, *arguendo*, that on this record Swainson waived his confrontation rights (which he did not), a conspiracy was never factually or legally established so as to serve as the legal vehicle which legitimized the otherwise inadmissible and odious hearsay. Petitioner believes that this record is such that this Court can ascertain that, confrontation rights notwithstanding, this hearsay was still inadmissible.

In *United States v. Nixon*, 418 US 683, 701, n. 14 (1974), the Court said that before hearsay can be admitted via the Hearsay-Conspiracy exception, "there must be substantial independent evidence of the conspiracy, at least enough to take the question to the jury." Such evidence is not present in this case.

If a *prima facie* case of Conspiracy to Commit Bribery is established on this record it must essentially be between Wish and Whalen. The Government cannot cite this court to sufficient *non-hearsay* evidence to establish an illegal bribery agreement between Whalen and Swainson. These two never even spoke to each other and the record simply does not factually establish a *primary* conspiracy between Wish and Swainson. But if an illegal primary agreement between Wish and Whalen is shown,

it is arguable that the case was jury submissible as to Swainson on the Conspiracy Count on the theory articulated in cases such as *United States v. Reynolds*, 511 F 2d 603, 607 (5th Cir., 1975) and *United States v. Overshon*, 494 F 2d 894, 896 (8th Cir., 1974). Thus, in order to see if the testimony satisfies this theory one must first look at the record evidence treating the relationship between Co-Defendant Wish and unindicted Co-Conspirator Whalen.

Before the Sixth Circuit Petitoner argued that a conspiracy between Whalen and Wish could not exist because from the inception of the alleged conspiracy Whalen was a government informer who feigned participation in order to frustrate the alleged illegal scheme. *Every* court that has ever considered the question of whether one who is a Government informer from the inception of an alleged conspiracy is properly a co-conspirator has held that the feigning co-conspirator cannot be a member. Since it takes at least two to conspire, there can be no conspiracy if one of the two "co-conspirators" is in reality a government informer or agent who secretly intends to frustrate the conspiracy and its objects. *Sears v. United States*, 343 F 2d 139 (5th Cir., 1965); *United States v. Morello*, 250 F 2d 631 (2d Cir., 1957); *King v. State*, 104 So 2d 730, 732-33 (Fla, 1957); *People v. Atley*, 392 Mich 298, 220 NW 2d 465 (1974). Note — *Developments in the Law - Criminal Conspiracy*, 72 Harv L Rev 920, 926, n. 35 (1959).

Rejecting Petitioner's argument, the Sixth Circuit found that the record did not establish that Whalen was, in fact, a Government informer from the inception of the alleged conspiracy. The Court of Appeals did not cite any portion of the trial record to substantiate its holding. Perhaps that is because there exists no portion of this record which can support that Court's ruling.

The record clearly does not support the Court of Appeals' contention that Whalen was in fact a bona fide co-conspirator from the inception of the alleged partnership in crime (R. 1070-1075, 1078, 1079, 1088, 1090, 1091, 1092-95). For example, the following colloquy, found at R. 1096-1097, clearly illustrates that *before* accepting Wish's invitation, Whalen informed the FBI of its offer and, further, that Whalen never legally or factually became a co-conspirator:

> "Q. Now, getting back to the summer of 1972, you said it was a matter of a few days before your application for leave to appeal was filed that you and Mr. Wish had the conversation that you have testified to. What did you do *after* Mr. Wish told you that he could influence the outcome of your case in the Supreme Court?
>
> "A. I went to the FBI and advised the FBI of the conversation.
>
> "Q. And what did the FBI ask you to do for them?
>
> "A. They asked me would I go in with a monitor.
>
> "Q. And did you?
>
> "A. Yes, sir.
>
> "Q. And the conversations that have been tape recorded and played for the jury from August 8, 1972 through January 10, 1974, did you on each occasion wear a monitoring device voluntarily?
>
> "A. Yes, sir."
>
> (R. 1096-1097.) (Emphasis supplied.)

The District Court and the Court of Appeals were in error in deciding this issue in favor of the Government. Because Whalen never was Wish's co-conspirator, the hundreds of pages of hearsay evidence, admitted over zealous objection and solely pursuant to the Federal Conspiracy-Hearsay exception, were introduced to the jury on an unsupportable legal fiction which devastated Petitioner's ability to defend himself fairly against these charges.

D.

Lastly, even if this record factually establishes a conspiracy to Commit Bribery (which it does not), voluminous prejudicial hearsay evidence was introduced over defense objection which does not satisfy the Federal Conspiracy-Hearsay exception because much of the hearsay statements of other alleged conspirators admitted by the District Court were statements *not* made in *furtherance* of the conspiracy nor during its course. *Anderson v. United States*, 417 US 211, 218-219 (1974).

The Court's decisions establish certain "scrupulously observed" limitations in the Federal Conspiracy-Hearsay exception to the Hearsay rule. *Krulewitch v. United States*, 336 US 440 (1949); *Lutwak v. United States*, 344 U 604 (1953); *Fiswick v. United States*, 329 US 211 (1946); *Wong Sun v. United States*, 371 US 471 (1963); *Anderson v. United States*, 417 US 211 (1974). See, generally, 4 *Wigmore on Evidence*, §1079 (Chadbourn rev. 1972). Many of the plainly hearsay statements in this record were admitted subsequent to achieving the alleged object of the Conspiracy, to-wit: the reversal by the

Michigan Supreme Court of Whalen's Burglary conviction.* [See, *People v. Whalen*, 390 Mich 672; 213 NW 2d 116 (1973)]. Statements of alleged co-conspirators, clearly made *after* the alleged end of the conspiracy had been successfully achieved, *subsequent* to Petitioner's alleged participation in the conspiracy, and plainly *not* "in furtherance of the conspiracy charged" were inadmissible under any theory. *Wong Sun v. United States*, *supra*; *Anderson v. United States*, *supra*. This myriad hearsay flagrantly violated Petitioner's constitutionally guaranteed right of confrontation and cross-examination and necessitates correction by the Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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Dated:
February 21, 1977

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* According to witness Whalen, he began to make alleged payments to Swainson through Wish in late October, 1972 (R. 1115-1121). *Nothing* occurred between the end of November, 1972 and October, 1973 (R. 1122). On October 5, 1973, Wish asked Whalen for $10,000.00 which was allegedly for Swainson (R. 1124). Finally Whalen testified that on October 11, 1973 he paid Wish $10,000.00 (R. 1128-1129). Thus, at *a minimum* the tape recordings represented at R. 808-814 should not have been admitted into evidence against Defendant's repeated objections. Moreover, *if* the Conspiracy is deemed to have concluded in November, 1972 (R. 1122) then all of the tape recordings (the transcripts of which are set out in the Appendix) from R. 755 through 874 should not have been admitted. *Anderson v. United States*, *supra*, at 218; *Wong Sun v. United States*, 371 US 471, 490 (1963).

APPENDIX A

ORDER

(In The United States District Court,
Eastern District of Michigan,
Southern Division)

This matter is before the Court for consideration of nine post trial motions of defendant John B. Swainson, five of which have also been made on behalf of defendant Harvey Wish and upon a separate post trial motion on behalf of Harvey Wish.

By agreement of counsel with the Court, these motions have been identified by issue number and they will be so referred to herein. For record purposes it should be noted that defendant Wish joins in Issues 2, 4, 5, 7 and 8. Issues 1, 2, 5, 7, 8 and 9 seek a new trial; Issues 3 and 4 seek a judgment of acquittal. Issue 6 requests a new trial and an order of dismissal. Issue 10 seeks a separate judgment of acquittal or in the alternate, a motion for a new trial.

Issue 1 concerns itself with the admissibility of tape recordings. The law is well settled in this circuit that such recordings are admissible in evidence and do not violate the Sixth Amendment of the United States Constitution. *See United States v. Vigi*, 363 F.Supp. 314 (E.D. Mich. 1973), *aff'd*. 515 F.2d 290 (1975); *United States v. Osborne*, 350 F.2d 497 (6th Cir. 1965), *aff'd*. 385 U.S. 323; *United States v. Franks*, 511 F.2d 25 (6th Cir. 1975), *cert. denied* 95 S. Ct. 2654.

Issue 2 and Issue 7 will be considered together. Issue 2 concerns itself with the procedure for jury selection; Issue 7 deals with the cross-examination of Government witnesses. Counsel for both defendants have conceded

that the factual predicate for each of these motions is erroneous. Counsel were advised two months in advance of the procedure for impanelling the jury. Such procedure in accordance with Rule 24(a) of the Federal Rules of Criminal Procedure involved voir dire by the Court with an opportunity to submit written questions given to counsel in advance and the exercise of preemptory challenges at the bench. Counsel were granted a recess after passing the panel for cause and jurors prepared additional questionnaires for counsel's use (Record pp. 26, 27, 28). Counsel at all times knew which prospective jurors were challenged and which prospective jurors were next for selection. Counsel were given opportunities to consult with their clients (Record, pp. 29-43). Counsel repeatedly indicated understanding of the procedure (Record pp. 31, 34, 38, 39, 40).

Issue 7 dealing with the asserted interference by the Court with cross-examination of witness is likewise a matter upon which the factual predicate is demonstrably incorrect. The Court will rely upon the record as to this issue and refrain from further comment.

The Court is aware that co-counsel for defendant Swainson, who did not participate in the trial, was called upon to prepare these various post trial motions. His erroneous assumptions as to Issues 2 and 7 are understandable and the subsequent filing of factual corrections together with the record disposes of these matters.

Issue 3 asserts a factual defense to Counts Four, Five and Six of the indictment. In effect, defendant Swainson urges that the Court retry an issue of fact which was submitted to the jury. This matter was appropriately covered by instructions to the jury. Such instructions included the following: Charges 3801.1, 3801.2 and 3801.3

dealt with the specific charges; Charge 3802 described the statute in question; Charge 3803 indicated the elements of the offense; Charge 3804, the necessity of independent witness; 3805 the necessity of considering the entire testimony; 3800, the necessity for a material and wilful statement; 3807, the instruction that the statements were material; 3808 a definition of "wilfully;" and 3809 dealing with a subsequent correction of false testimony. The record of this matter will indicate defense counsel were presented with the tentative charges of the Court, given an opportunity to object, in accordance with Rule 30 of the Federal Rules of Criminal Procedure, and did not do so. The determination of the jury upon the facts is not a matter for the Court intervention at this time.

Issue 4 concerns itself with the length of time involved in the investigation and prior to the determination by the Grand Jury. This issue was a subject of motion addressed to the Court and ruled upon in the order of October 6, 1975 (see pp. 2 & 3 thereof). The position taken then in regard to defendant Goldfarb is equally applicable here to defendants Swainson and Wish. Neither for such motion nor for this motion has the Court been cited to authority that may limit the right of any investigatory agency to conduct as careful and comprehensive an investigation as it sees fit. Without limiting the Court's denial as to both defendants on this Issue 4, the Court observes in passing that defendant Swainson was convicted of perjuries which occurred on May 19, 1975, for which he was indicted on July 3, 1975, and tried on October 20, 1975.

Issue 5 deals with the asserted misconduct of Juror Barbara Ramsey. Defendants' assertion is based upon second degree hearsay and something less than probative evidence. It should be clear that the alleged contact with her husband occurred at the latest some five days prior to the commencement of jury deliberation.

If counsel assert the proposition that any contact by a non-juror with a juror while a case is in progress and before deliberation commences constitutes misconduct, this Court seriously doubts that any jury ever impanelled in any case could even function. Sequestration does not establish a different standard from a non-sequestered jury in terms of conduct. Despite the standard and repeated admonitions in every jury case, civil and criminal, urging that jurors not discuss the case with any other person, it would be a naive judge indeed who would believe that such discussions have never occurred.

Issue 6 raises a new question. Defendant Swainson asserts that he should have been indicted under Section 1623 rather than Section 1621, since Section 1621 denies him the defense of recantation. The relationships of these two statutes has not been considered in this circuit. It has been considered in the Second Circuit, generally contrary to defendant's position. The Second Circuit is particularly appropriate, since it would appear that Section 1623, adopted as part of the Omnibus Organized Crime Control Act of 1970, was taken from similar statutes in the state of New York (N.Y. Penal Law 210.25). In the case of *United States v. Kahn*, 472 F.2d 272 (2d Cir. 1973), *cert. denied* 411 U.S. 982, 93 S.Ct. 2270, 36 L.Ed.2d 958, the United States Court of Appeals for the Second Circuit made the following observation:

> "And we find not a little disturbing the prospect of the government employing Section 1621 whenever a recantation exists and Section 1623 when one does not, simply to place perjury defendants in the most disadvantageous trial position." See p. 283.

Whatever emotional appeal defendant Swainson's excellent memorandum may have, it is clear that the enactment of Section 1623 did not repeal Section 1621 and that the United States has the option of charging under either section.[1] Perhaps Congress should have repealed Section 1621 as to grand jury testimony, when it passed Section 1623. It is not the function of a United States district court to determine the wisdom of legislative enactment.

Issue 8 deals with an asserted denial of defendants' right to interview law enforcement officers. Defendants contend that such denial commenced September 30, 1975, by a letter from Assistant United States Attorney Ozer. At no time prior or during the trial of this matter was this issue raised by defense counsel. Numerous comprehensive pretrial motions were filed by defense counsel, ably researched, and carefully presented. Such motions were disposed of in this Court's order of October 6, 1975, previously referred to. Had counsel brought this matter to the Court's attention prior to trial, inquiry could have been made. This Court is unwilling to permit

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[1] Title 18, United States Code, Section 1623, became effective as part of the Omnibus Crime Control Act of 1970, on October 15, 1970, 84 Stat. 932, Pub. L. 91-452, Title IV, §401(a). The purpose of §1623 is to provide a more rational, more expedient means of conducting a criminal perjury prosecution:

> [T]itle IV creates a new Federal false statements offense for grand jury and court proceedings which will not be subject to the artificial and anachronistic evidentiary rules that hamper perjury prosecutions in our courts.
>
> Statement of Congressman Poff of Virginia in the Congressional Record, Vol. 116, page 35292, October 7, 1970.

counsel to remain silent, deny the trial court an opportunity to exercise its supervisory powers, and then after a verdict of guilty seek a new trial on such assigned grounds.

Issue 9 deals with the asserted failure of the United States to make available to defendant exculpatory evidence, such exculpatory evidence being testimony of defense witnesses Auer and Kalkanian. The Court has carefully examined the six page brief which accompanied this motion. The Court has read the authorities cited and is unable to understand defendant's assertions. Defendant appears to suggest that there is a duty upon the United States to reveal to defendant what defendant's own witness may testify to on trial. The Court is not persuaded by this position.

Issue 10 concerns the motion of defendant Wish for judgment of acquittal or in the alternative a new trial as to Count Nine. The basis of this motion is Wharton's Rule, the following version of which the Sixth Circuit Court of Appeals adopted in *United States v. Vigi*, 515 F.2d 290 (6th Cir. 1975):

> An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission. 1 Anderson, Wharton's Criminal Law and Procedure, §89, at 191 (1957).

The operation of the rule was explained by the Supreme Court in *Iannelli v. United States*, 419 U.S. 770 (1975):

> Wharton's Rule applies only to offenses that *require* concerted criminal activity, a plurality of

> criminal agents. In such cases, a closer relationship exists between the conspiracy and the substantive offense because *both* require collective criminal activity. The substantive offense therefore presents some of the same threats that the law of conspiracy normally is thought to guard against, and it cannot automatically be assumed that the Legislature intended the conspiracy and the substantive offense to remain as discrete crimes upon consummation of the latter. Thus, absent legislative intent to the contrary, the Rule supports a presumption that the two merge when the substantive offense is proved.

A reading of the rule obviates its application in this case. Defendant Wish was charged only with conspiracy to commit bribery, not the substantive offense itself. Therefore, the question of whether a charge of conspiracy to commit bribery merges into the offense of bribery does not even arise here. Conspiracy constitutes a separate offense under 18 U.S.C. §371, the essence of which is an agreement to commit an unlawful act. Once an agreement to bribe defendant Swainson was found to exist between John Whalen and Harvey Wish, the conspiracy was established, even if the separate offense of bribery was not committed.

Based upon the foregoing, the Court does hereby Overrule each and every motion made by each defendant and does Deny all motions for new trial or for acquittal.

It is so Ordered.

Carl B. Rubin
United States District Judge

18 USC SECTION 1621

Section 1621. Perjury generally.—Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

18 USC SECTION 1623

1623. False declarations before grand jury or court.—(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree

that one of them is necessarily false, need not specify which declaration is false if —

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under the section. In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(3) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence. (Oct. 15, 1970, P. L. 91-452, Title IV, § 401(a), 84 Stat. 932.) (Emphasis Supplied.)

APPENDIX B

OPINION

No. 76-1702

(United States Court of Appeals
For the Sixth Circuit)

(Decided and Filed January 31, 1977)

Before: Weick, Peck and Lively, Circuit Judges.

Lively, Circuit Judge. The appellant, a justice of the Supreme Court of Michigan, was indicted by a grand jury of the Eastern District of Michigan. He and one Harvey Wish were charged in three counts with furtherance of an illegal scheme involving bribery by use of the mails and interstate facilities of communication. The appellant was also charged under 18 U.S.C. §1621[1] with perjury before the grand jury, based on his answers to questions concerning three occurrences involving him and Harvey Wish. In addition, Swainson, Wish and one Charles Goldfarb were charged with conspiring with each other and with an unindicted co-conspirator, John Joseph Whalen, to carry on the illegal activity of bribery.

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[1] §1621. Perjury generally

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States. June 25, 1948, c. 645, 62 Stat. 733; Oct. 3, 1964, Pub. L. 88—619, § 1, 78 Stat. 995.

The appellant and Harvey Wish were tried together. At the conclusion of all the evidence the district court granted appellant's motion for acquittal on the three charges involving use of the mails and interstate facilities, but submitted to the jury the conspiracy charge and the three perjury counts. The jury found Swainson not guilty of conspiracy and guilty on all three perjury counts. As to the co-defendant Wish, the court submitted one count related to use of mails and interstate facilities and the conspiracy charge. The jury found Wish guilty of conspiracy and not guilty of the substantive charge. Wish did not appeal.

This case is based on the allegation of the government that Harvey Wish, a professional bail bondsman, agreed with appellant for the payment of money in return for appellant's favorable action on behalf of Whalen, whose appeal of a larceny conviction was before the Supreme Court of Michigan. In the summer of 1972 Whalen reported to the FBI office in Detroit that Wish had proposed a bribery scheme involving appellant, and in subsequent meetings with Wish, Whalen carried a concealed microphone. It was testified at the trial that one or more FBI agents were stationed nearby when Wish and Whalen met, and that a number of their conversations were monitored and recorded on tapes. In addition, Swainson, Wish and Whalen were placed under FBI surveillance.

ISSUES RELATED TO THE TAPES

Appellant objected in the district court to use of the tapes on the ground that they contained prejudicial hearsay evidence. Judge Rubin pointed out that Wish, Whalen and appellant were all charged as co-conspirators

and that Wish and appellant were charged with joint actions in furtherance of an illegal scheme. Relying on the "co-conspirator exception" to the hearsay rule, the court permitted the tapes to be introduced and played for the jury, subject to an ultimate determination of whether there was independent evidence of a conspiracy or criminal joint venture. At the conclusion of the government's case the district court ruled that a prima facie case of conspiracy had been made out by independent evidence.

A.

On appeal it is argued that appellant's acquittal on the conspiracy charge requires reversal of his conviction for a new trial with the evidence contained on the tapes excluded. The appellant relies primarily on this court's decision in *United States* v. *Lucido*, 486 F.2d 868 (1973), to support his argument. In *Lucido* we held that where hearsay statements of an alleged co-conspirator are admitted ". . . . acquittal on the conspiracy charge makes necessary inquiry into the possible prejudice that resulted from the introduction of this evidence." *Id.* at 869. In *United States* v. *Suchy*, 540 F.2d 254, 257 (6th Cir. 1976), the court specifically declined to declare "a per se rule of prejudice, requiring that wherever the Government is able to put hearsay before a jury solely because of an unproven conspiracy count, any conviction on substantive counts must be set aside."

The conviction in *Lucido* was reversed upon a finding that the record contained no independent evidence of an illegal joint venture. An examination of the transcript of appellant's trial reveals testimony by officers who conducted the surveillance of the suspected conspirators concerning meetings between Wish and Whalen followed

by meetings between Wish and appellant; records of telephone conversations between Wish and appellant at times when the appeal of Whalen was being considered and reconsidered by the Michigan Supreme Court; and the direct testimony of Whalen that he gave Wish $20,000 to be paid to Swainson for his efforts on behalf of Whalen. Without reciting the evidence in detail the court is satisfied that it was sufficient to establish, without consideration of any hearsay, a prima facie case of the existence of a conspiracy involving Wish, Whalen and the appellant.

B.

Appellant also argues that even if the independent evidence were otherwise sufficient to establish a prima facie case of conspiracy between Wish and Whalen, no conspiracy was legally possible because Whalen was working from the beginning as a government agent and, therefore, his activities were not illegal. The record does not support this argument. Whalen testified that he went to the FBI *after* Wish told him of the possibility of influencing appellant on behalf of Whalen. The government did not furnish the money which Whalen paid to Wish. Though he cooperated with the FBI as an informer, Whalen was not acting as a government agent in his dealings with Wish. By his testimony he agreed to the proposal that he give money to Wish for payment to appellant as an inducement to favorable consideration of his appeal. His role as an informer did not render his agreement with Wish something other than a criminal conspiracy. *United States* v. *DeSapio*, 435 F.2d 272, 282 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971). Moreover, if Swainson agreed to accept illegal payments from Wish in return for help in the Whalen appeal, an illegal conspiracy between Wish and Swainson would have existed, regardless of the true role of Whalen.

C.

Appellant contends that his constitutional right of confrontation was violated by the fact that he could not require his co-defendant, Wish, to undergo cross-examination with respect to the statements recorded on the tapes. Appellant relies on *Bruton* v. *United States*, 391 U.S. 123 (1968). In *Bruton* the Supreme Court held that one defendant in a joint trial was denied his Sixth Amendment right of confrontation by the admission in evidence of a confession of his co-defendant implicating both defendants in the crime for which they were being tried. The present case did not involve a confession by Wish. The argument based on *Bruton* falls with our determination that the recorded statements of Wish and Whalen were admissible as declarations of co-conspirators, as appellant appears to recognize on page 39 of his brief.

D.

More to the point is appellant's argument that he was entitled to be tried separately because of general prejudice. Though appellant knew of the contents of the tapes prior to trial, no motion for a severance was made pursuant to Rule 14, Fed. R. Crim. P. Such a motion must be made prior to trial. Rule 12(b) (5), Fed. R. Crim. P. The appellant argues that the effect of the recorded conversations was so overwhelmingly prejudicial as to require the district court to order a severance *sua sponte*. Appellant contended vigorously from the beginning of the trial that the tapes should have been excluded from evidence, but he never suggested to the district court that he should be granted a severance if they were admitted. In view of the basis on which the tapes were received in

evidence and the fact that when the tapes were being played for the jury it was instructed " . . . that any conversations between Wish and Whalen at this point in the proceedings is not evidence against Defendant Swainson and is not to be considered by you as such . . .," we find no prejudicial error in the failure of the district court to order a severance on its own motion.

E.

Finally, it is established that even where a conspiracy is not charged, declarations of partners in a criminal joint venture are admissible to prove the guilt of another partner. *United States* v. *Townes*, 512 F.2d 1057 (6th Cir.), *cert. denied*, 423 U.S. 846 (1975); *United States* v. *Talbot*, 470 F.2d 158 (6th Cir. 1972); *United States* v. *Perna*, 491 F.2d 253 (6th Cir.), *cert. denied*, 417 U.S. 934 (1974). As the court pointed out in *Talbot*, *supra*, 470 F.2d at 159, the required independent evidence of concerted action " . . . may be either direct or circumstantial." There was both direct and circumstantial evidence which was sufficient to make a prima facie case of joint illegal activity which would have made the tapes admissible if no conspiracy had been charged. The district court did not err in admitting the tapes.

THE PERJURY CHARGES

As has been noted, appellant was acquitted of conspiracy and of substantive charges related to the alleged bribery scheme, but was convicted of perjury. He raises two separate issues with respect to the perjury conviction.

A.

Appellant contends there is not sufficient evidence in the record to sustain his conviction of perjury under counts 5 and 6 of the indictment. It is contended that the government did not satisfy the "two witness rule," which precludes perjury convictions based solely on one person's word against another's by requiring that charges of perjury under 18 U.S.C. § 1621 be established by the testimony of two witnesses or testimony of one witness corroborated by independent evidence. Transcripts of two appearances by appellant before the grand jury were received in evidence. At first appearance appellant stated that he had no recollection of two telephone conversations with Harvey Wish involving the Whalen appeal. Two days later he told the grand jury that the two conversations had actually taken place. The testimony related to these two conversations was the basis of counts 5 and 6.

As will be discussed more fully, appellant's eventual admission that the conversations had taken place and had concerned the Whalen case came after he was aware that some of his activities had been the subject of FBI surveillance. There was independent corroborative evidence which supported the subsequent admission. When the alleged prejury relates to the state of mind of the accused, as in the present case ("I have no recollection"), proof of perjury must necessarily consist of proof of facts from which the jury may infer that the defendant must have known or remembered that which he denied knowing or remembering while under oath. Permitting perjury to be proven in this manner does not depart from the "spirit" of the two witness rule. *See United States* v. *Beach*, 296 F.2d 153, 155 (4th Cir. 1961). The jury could properly infer from all the evidence that appellant had wilfully failed to answer the questions concerning these conversations truthfully at his first appearance.

B.

Two other points should be made with respect to the sufficiency of the evidence of perjury. First, appellant does not contend that there was insufficient evidence to support his conviction under count 4 of the indictment. He received concurrent sentences under counts 4, 5 and 6. This court may decline to consider contentions of error with respect to counts the sentences for which run concurrently with the sentence on a valid count. *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16 (1973); *Ethridge* v. *United States*, 494 F.2d 351 (6th Cir.), *cert. denied*, 419 U.S. 1025 (1974).

In the second place, appellant presented evidence on his own behalf after the district court denied his motion for acquittal at the close of the government's case. This constituted a waiver of any objections to the court's denial of his motion. *United States* v. *Black*, 525 F.2d 668, 669 (6th Cir. 1975). Appellant did not renew his motion for acquittal at the conclusion of all the evidence, and the issue of sufficiency of the evidence can only be relied upon here under the "plain error" provision of Rule 52 (b), Fed. R. Crim. P. Our examination of the record reveals no plain error with respect to the sufficiency of the evidence.

C.

Appellant maintains that the government erred in charging him with perjury under 18 U.S.C. §1621 rather than under 18 U.S.C. § 1623. He argues that § 1621, which was enacted in 1948, deals with perjury generally, whereas § 1623, a 1970 enactment, is specifically limited to perjury in connection with court or grand jury proceedings. This, he contends, indicates a congressional direction to utilize § 1623 for cases such as his which

involve allegedly false statements to a grand jury. We note that Congress did not repeal § 1621 when it enacted § 1623, and did not specify that § 1623 became the exclusive basis for perjury prosecutions involving grand jury proceedings.

It is appellant's position that he would have been immune to prosecution under § 1623, because of the language of subsection (d) —

> (d) Where, in the same countinuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

He relies upon his admissions at his second appearance before the grand jury as a bar to prosecution under § 1623, and claims there was an abuse of the prosecutor's discretion in proceeding under § 1621 in order to avoid appellant's complete defense under § 1623.

This issue was raised by appellant for the first time in a post-trial motion. Rule 12(b), Fed. R. Crim. P., provides that —

> (1) Defenses and objections based on defects in the institution of the prosecution; or
>
> (2) Defenses and objections based on defects in the indictment . . .

must be raised prior to trial. The purpose of this rule is to prevent unnecessary trials. Here all the facts concerning

the two appearances of appellant before the grand jury were known long before the trial began and it was incumbent upon him to assert a timely claim that prosecution was barred by reason of his alleged recantation.

Even if this question were properly before us for review, it is clear from the record that § 1623(d) would not have precluded prosecution of appellant for perjury. When appellant made admissions concerning his conversations and transactions with Harvey Wish it had become "manifest that such falsity" had been exposed. His changed testimony came after he had heard transcripts of the testimony of two eye-witnesses to a previous transaction which he had categorically denied in his earlier testimony. *See United States* v. *Kahn*, 472 F.2d 272, 283-84 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973).

PRE-INDICTMENT DELAY

A.

Appellant contends his constitutional rights were infringed by the passage of time between completion of the government's investigation and return of the indictment under which he was tried. The Supreme Court has held that an accused who is not under arrest is protected from prejudice by reason of pre-indictment delay by the applicable statute of limitations, and that the Sixth Amendment's speedy trial provision has no application prior to actual arrest or formal indictment. *United States* v. *Marion*, 404 U.S. 307 (1971); *Dillingham* v. *United States*, 423 U.S. 64 (1975). If a defendant can show actual substantial prejudice to his right to a fair trial and that the delay was deliberately created to gain an

unfair tactical advantage for the government, he is entitled to dismissal for violation of Fifth Amendment due process rights. *Marion, supra*, 404 U.S. at 324; *United States* v. *Alred*, 513 F.2d 330 (6th Cir.), *cert. denied*, 423 U.S. 828 (1975); *United States* v. *Giacalone*, 477 F.2d 1273, 1277 (6th Cir. 1973).

Appellant has failed to show that any delay in presenting this case to the grand jury was intentional and designed to gain a tactical advantage. Furthermore, his claim of actual prejudice rests on the death before trial of a former chief justice of the Supreme Court of Michigan, the only witness who could have explained the way in which that court handled the Whalen appeal. This argument overlooks the fact that appellant was acquitted on the conspiracy charge and all substantive charges involving the alleged bribery scheme. The deceased witness could not possibly have furnished a defense to the perjury charges. The indictment was returned less than two months after appellant's grand jury appearances upon which the perjury charges were based. There simply was no unreasonable delay in seeking the indictment for perjury.

B.

If appellant is contending that his perjury indictment was a nullity because deliberate delay by the government in seeking an indictment rendered the proceedings of the grand jury before which he testified illegal, he is equally without support. The grand jury obviously was acting within its jurisdiction in investigating the charges that federal laws had been violated by the activities of Whalen, Wish and Swainson. Thus it was a "competent tribunal" within the meaning of 18 U.S.C. § 1621. *United*

States v. *Williams*, 341 U.S. 58, 66 (1951). Therefore appellant was required either to answer the questions before the grand jury truthfully or decline to answer. He did not have the option of testifying falsely because he denied the right of the grand jury to question him long after the activities under investigation had transpired. In *Bryson* v. *United States*, 396 U.S. 64, 72 (1961), the Supreme Court, holding that one who furnishes false information to the government in feigned compliance with a statutory requirement cannot defend against prosecution by challenging the validity of the requirement itself, concluded that —

> Our legal system provides methods for challenging the Government's right to ask questions — lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood. (footnote omitted).

See also United States v. *Mandujano*, — U.S. —, 44 U.S.L.W. 4629, 4633 (May 19, 1976).

JURY MISCONDUCT

After the jury had begun deliberations counsel for the defendants notified the district court that two spectators at the trial had overheard the husband of a juror make derogatory remarks about the appellant. The jury was sequestered during the trial, and the court had permitted brief periods of visitation between jurors and members of their families during week-end recesses. There was no contact between jurors and non-jurors after the case was submitted and deliberations were begun. The jury was

repeatedly admonished throughout the trial not to discuss the case with anyone prior to its submission. It was within the discretion of the trial judge to decide the degree of sequestration required, and to determine whether the information related by defense counsel required further investigation. *Tillman* v. *United States*, 406 F.2d 930, 938 (5th Cir.), *cert. denied*, 395 U.S. 830 (1969). On the record before us, we perceive no abuse of discretion in the district court's refusal to conduct a hearing into the question of possible juror misconduct.

CONCLUSION

Throughout his brief and oral argument appellant has charged the government with unfairness in the prosecution of this case. Our careful examination of the record reveals no justification for these charges. The government made a full pre-trial disclosure of its case to the defendants and no claim of surprise has been made.

The principal contention of appellant is that the government poisoned the minds of the jury by introducing the taped conversations between Wish and Whalen. While these tapes were damaging, it must be remembered that appellant was acquitted on all charges related to bribery. Proof of the perjury charges was so intertwined with evidence relating to the other counts that it was clearly within the discretion of the prosecutor to try all the charges together. Rule 8(a), Fed. R. Crim. P. Furthermore, the tapes contained no information with respect to the activities which formed the basis for the perjury charge in count 4. That charge was proven by overwhelming evidence and involved a positive denial by appellant rather than a statement of no recollection.

The judgment of the district court is affirmed.

APPENDIX C

INDICTMENT

(United States District Court —
Eastern District of Michigan
— Southern Division)

(Filed July 3, 1975)

UNITED STATES OF AMERICA, Plaintiff

v

JOHN B. SWAINSON and HARVEY WISH,
Defendants

Count One

The Grand Jury charges:

1. That on or about October 18, 1972, in the Eastern District of Michigan, John B. Swainson and Harvey Wish, defendants herein, used and caused to be used a facility in interstate commerce, to wit, the telephone from the State of New York to Detroit, Michigan, in the Eastern District of Michigan, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, the said unlawful activity being bribery in violation of Michigan Compiled Laws Annotated, Sections 750.117 and 750.118; and John B. Swainson and Harvey Wish did thereafter promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of the said unlawful activity.

2. It was part of the said unlawful activity that John B. Swainson, who was then and there a judicial officer of the State of Michigan, to wit, an Associate Justice of the Supreme Court of Michigan, would accept the promise to pay thirty thousand dollars ($30,000.00) and would actually accept and receive twenty thousand dollars ($20,000.00) from Harvey Wish who would promise and pay the said money under an agreement and with an understanding that the vote, opinion, and judgment of the said John B. Swainson should be given in favor of John Joseph Whalen, the Defendant-Appellant in the case of *People of the State of Michigan v. John Joseph Whalen*, a cause and proceeding which was by law then and there brought before John B. Swainson in his official capacity as Associate Justice of the Supreme Court of Michigan.

3. It was part of the said unlawful activity to utilize the telephone as aforesaid for the purpose of facilitating the bribery; that is to say, to inform John Whalen, the party making payment of the said bribe, that the Supreme Court had acted favorably on behalf of John Whalen and that John Whalen should therefore continue in his ongoing endeavor to make payment of twenty thousand dollars ($20,000.00) as aforesaid.

All of the above in violation of Title 18, United States Code, Section 1952.

Count Two

The Grand Jury further charges:

1. That from on or about the first day of December, 1970, up to approximately the 28th day of February,

1974, in the Eastern District of Michigan, John B. Swainson and Harvey Wish, defendants herein, did devise and intend to devise a scheme and artifice to defraud and for the purpose of executing such scheme and artifice did knowingly cause to be delivered by mail, according to the direction thereon, a certain matter or thing.

2. It was part of the said scheme and artifice to defraud that John B. Swainson and Harvey Wish, would cause the promise of thirty thousand dollars ($30,000.00) and the actual payment of twenty thousand dollars ($20,000.00) to John B. Swainson, an Associate Justice of the Supreme Court of Michigan, to influence the vote and opinion of the said John B. Swainson in favor of John Joseph Whalen, the Defendant-Appellant in the case of *People of the State of Michigan v. John Joseph Whalen*, a legal action then pending before the Supreme Court of Michigan.

3. It was further part of the said scheme and artifice to defraud that John B. Swainson would obtain the concurrence of the Chief Justice and certain of the Associate Justices of the Supreme Court of Michigan in favor of the said John Joseph Whalen in part by representation that the vote and opinion of the said John B. Swainson as communicated by him to the Chief Justice and Associate Justices of the Supreme Court of Michigan were the bona fide honest vote and opinion of John B. Swainson on the merits of the said legal action; and John B. Swainson would and did conceal from the said Chief Justice and Associate Justices of the Supreme Court of Michigan that the said vote and opinion of John B. Swainson were, in truth and in fact, influenced by the payment of money, and the promise to pay money, as aforesaid, to John B. Swainson.

4. It was further a part of the said scheme and artifice to defraud that John B. Swainson, an agent and employee of the State of Michigan, would receive from Harvey Wish as aforesaid, twenty thousand dollars ($20,000.00) as a reward for certain official action taken by John B. Swainson as an agent and employee of the State of Michigan; and John B. Swainson would avail himself of such profit without any agreement between John B. Swainson and the State of Michigan that John B. Swainson could and should avail himself of such profit; and John B. Swainson would conceal from the State of Michigan the receipt by John B. Swainson of such profit; and John B. Swainson would knowingly fail to account, in any way, to the State of Michigan for such profit.

5. It was further a part of the said scheme and artifice to defraud that John B. Swainson and Harvey Wish, by the payment of money and the promise to pay money, as aforesaid, to John B. Swainson, would influence the conduct of John B. Swainson as aforesaid and would thereby deprive the people of the State of Michigan of the honest, loyal, and faithful services of John B. Swainson in his capacity as an Associate Justice of the Supreme Court of Michigan.

6. On or about October 24, 1972, for the purpose of executing the said scheme and artifice to defraud, John B. Swainson and Harvey Wish, did knowingly cause to be delivered by mail in the Eastern District of Michigan, according to the direction thereon a certain envelope, addressed to Neil H. Fink, Esquire, attorney for John Joseph Whalen, Guardian Building, Detroit,

Michigan, from the offices of the Supreme Court of Michigan, containing a notification that the Supreme Court of Michigan had *sua sponte* granted leave to appeal in the case of *People of the State of Michigan v. John Joseph Whalen*.

All of the above in violation of Title 18, United States Code, Section 1341.

Count Three

The Grand Jury further charges:

1. Paragraphs 1, 2, 3, 4, and 5 of Count Two hereof are hereby incorporated by reference as though fully set forth herein.

2. On or about December 22, 1972, for the purpose of executing the said scheme and artifice to defraud, John B. Swainson and Harvey Wish, did knowingly cause to be delivered by mail, in the Eastern District of Michigan, according to the direction thereon, a certain envelope, addressed to Neil H. Fink, Esquire, attorney for John Joseph Whalen, Guardian Building, Detroit, Michigan. from the offices of the Supreme Court of Michigan, containing a notification that the Supreme Court of Michigan had granted continuation of bond pending appeal in the case of *People of the State of Michigan v. John Joseph Whalen*.

All of the above in violation of Title 18, United States Code, Section 1341.

Count Four

The Grand Jury further charges:

1. That on or about the 19th day of May, 1975, in the Eastern District of Michigan, John B. Swainson, defendant herein, having first taken an oath to testify

truthfully before a United States Grand Jury, a competent tribunal authorized by law to administer the said oath, did willfully and contrary to the said oath state material matter which he then and there did not believe to be true.

2. At the said time and place the United States Grand Jury was conducting an inquiry into allegations that John B. Swainson as an Associate Justice of the Supreme Court of Michigan had received from Harvey Wish a bribe in the case of *People of the State of Michigan v. John Joseph Whalen* and that the said bribe was promoted and carried on by utilization of a facility in interstate commerce, and that the said bribery scheme constituted a scheme and artifice to defraud which scheme and artifice to defraud had been executed by utilization of the United States mail.

3. At the said time and place, it was material to the said inquiry by the United States Grand Jury, to ascertain whether or not John B. Swainson had ever received anything of value from Harvey Wish, and particularly whether or not John B. Swainson, on October 15, 1973, received from Harvey Wish a television or a large carton which appeared to contain a television.

4. At the said time and place, having first sworn to testify truthfully, as aforesaid, John B. Swainson testified as follows:

Q. Did you have an occasion before the Opinion was signed, specifically on October 15th, 1973, to receive a television set from Harvey Wish?

A. I did not.

Q. Did you receive a large carton that looked like a television box?

A. On October 15th?

Q. Yes.

A. I did not.

5. The said testimony of John B. Swainson was false in that John B. Swainson well knew at the time he testified as aforesaid, that on October 15, 1973, he had received from Harvey Wish a television in a box designated as such.

All of the above in violation of Title 18, United States Code, Section 1621.

Count Five

The Grand Jury further charges:

1. That on or about the 19th day of May, 1975, in the Eastern District of Michigan, John B. Swainson, defendant herein, having first taken an oath to testify truthfully before a United States Grand Jury, a competent tribunal authorized by law to administer the said oath, did willfully and contrary to the said oath, state material matter which he then and there did not believe to be true.

2. At the said time and place the United States Grand Jury was conducting an inquiry into allegations that John B. Swainson as an Associate Justice of the Supreme Court of Michigan had received from Harvey Wish a bribe in the case of *People of the State of Michigan v. John Joseph Whalen* and that the said bribe was promoted and carried on by utilization of a facility in interstate commerce, and that the said bribery scheme constituted a scheme and artifice to defraud which scheme and artifice to defraud had been executed by utilization of the United States mail.

3. At the said time and place, it was material to the said inquiry by the United States Grand Jury, to ascertain whether or not John B. Swainson had discussed with Harvey Wish on October 6, 1972, an

appeal being brought by John Whalen, and specifically whether or not on October 6, 1972, Harvey Wish read to John B. Swainson over the telephone a portion of a then pending application by John Whalen for leave to appeal to the Supreme Court of Michigan.

4. At the said time and place, having first sworn to testify truthfully, as aforesaid, John B. Swainson testified as follows:

Q. On October 6th, 1972, did you have occasion to speak on the telephone with Harvey Wish, concerning the Whalen appeal?

A. I have no recollection of ever talking to Mr. Wish about the appeal. October 6, 1972? I have talked to Mr. Whalen and on the phone but I can't recall talking to him about the appeal.

Q. You just said you talked to Mr. Whalen on the phone, I assume you meant Mr. Wish?

A. Yes, I'm sorry, I did mean Mr. Wish. I don't know Mr. Whalen.

Q. Again, Justice Swainson, you used the term you don't recall. I want the record to be clear whether you feel there is any, you know, doubt or uncertainty in your mind, whether you had occasion to speak with Wish about the Whalen appeal while it was being considered by the Supreme Court.

A. I have no recollection of that, Mr. Ozer, at all.

* * * * *

Q. On October 6, 1972, did you return a telephone call to Mr. Wish at his office and did he on that occasion read to you a portion of the pending application for leave to appeal?

A. October 6th, 1972?

Q. Yes.

A. I have no idea that that happened, Mr. Ozer.

Q. In your interview on April 30th, 1975, Mr. Naropi asked you: "In the year 1972 or the year 1973 did you have any discussions with Harvey Wish and these discussions would relate to John Whalen?"

Your answer was, "I did not."

Now is that your answer today?

A. That is my answer.

Q. And then, further, within a few seconds Mr. Naropi asked, "During any calls that you would have received from Harvey Wish during the year 1972 and 1973, do you remember having any conversations with Mr. Wish that would relate to the case of John Whalen?"

"I do not."

That is still your testimony?

A. Those would still be my recollections.

* * * * *

5. The said testimony of John B. Swainson was false in that John B. Swainson well knew at the time he testified as aforesaid, that on October 6, 1972, John B. Swainson conducted a telephone conversation with Harvey Wish, in which telephone conversation John B. Swainson and Harvey Wish discussed an appeal then being brought by John Whalen to the Supreme Court of Michigan, and in which telephone conversation Harvey Wish read to John B. Swainson a portion of a then pending application by John Whalen for leave to appeal to the Supreme Court of Michigan.

All of the above in violation of Title 18, United States Code, Section 1621.

Count Six

The Grand Jury further charges:

1. That on or about the 19th day of May, 1975, in the Eastern District of Michigan, John B. Swainson,

defendant herein, having first taken an oath to testify truthfully before a United States Grand Jury, a competent tribunal authorized by law to administer the said oath, did willfully and contrary to the said oath state material matter which he then and there did not believe to be true.

2. At the said time and place the United States Grand Jury was conducting an inquiry into allegations that John B. Swainson as an Associate Justice of the Supreme Court of Michigan had received from Harvey Wish a bribe in the case of *People of the State of Michigan v. John Joseph Whalen* and that the said bribe was promoted and carried on by utilization of a facility in interstate commerce, and that the said bribery scheme constituted a scheme and artifice to defraud which scheme and artifice to defraud had been executed by utilization of the United States mail.

3. At the said time and place, it was material to the said inquiry by the United States Grand Jury to ascertain whether or not John B. Swainson had telephoned the office of Harvey Wish on October 19, 1972, and left a message for Harvey Wish, at that time, the Supreme Court of Michigan was then granting leave to appeal in the case of *People of the State of Michigan v. John Joseph Whalen.*

4. At the said time and place, having first sworn to testify truthfully, as aforesaid, John B. Swainson testified as follows:

Q. Well, specifically did you have occasion on October 19th, 1972, to telephone Harvey Wish at his office and leave a message for him to the effect that the court is entering a — or granting leave to appeal in the Whalen case?

A. I have no recollection of doing that at all, sir.

Q. Justice Swainson, you have used the phrase on several occasions with respect to matters that are of some considerable importance, the phrase I am referring to is that you have no recollection. You have, I suspect, discerned that I am directing your attention to incidents of alleged or believed involvement on your part with Harvey Wish, at times bearing a critical relationship to the timing of the Whalen case through the Supreme Court, and on these various matters the visit to the home in September with packages, the visit to the office several days before the sua sponte grant, the telephone call within two or three days of the sua sponte grant, and when you say you don't recall that do you feel that it happened and that it just slipped your memory?

A. No, I don't feel it happened. This is my problem, I have no recollection. I don't recall discussing this case and that's what I am saying.

5. The said testimony of John B. Swainson was false in that John B. Swainson well knew at the time he testified as aforesaid, that on October 19, 1972, John B. Swainson had telephoned the office of Harvey Wish and left a message for Harvey Wish that the Supreme Court of Michigan was then granting leave to appeal in the case of *People of the State of Michigan v. John Joseph Whalen.*

All of the above in violation of Title 18, United States Code, Section 1621.

* * * * *

Count Nine

The Grand Jury further charges:

1. That from on or about the first day of December, 1970, and thereafter continuously up to approximately the 28th day of February, 1974, in the Eastern District

of Michigan, John B. Swainson and Harvey Wish, defendants herein, did combine, conspire, confederate, and agree, together with each other and with John Joseph Whalen named herein as an unindicted co-conspirator and not as a defendant to commit offenses against the United States; to wit:

2. It was part of the said conspiracy that on or about October 19, 1972, in the Eastern District of Michigan, John B. Swainson and Harvey Wish, defendants herein, would use and cause to be used a facility in interstate commerce, to wit, the telephone from the State of New York to Detroit, Michigan, in the Eastern District of Michigan, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, the said unlawful activity being bribery in violation of Michigan Compiled Laws Annotated, Sections 750.117 and 750.118; and John B. Swainson and Harvey Wish, would thereafter promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of the said unlawful activity.

3. It was further part of the said conspiracy that John B. Swainson, who would be then and there a judicial officer of the State of Michigan, to wit an Associate Justice of the Supreme Court of Michigan, would accept the promise to pay thirty thousand dollars ($30,000.00) and would actually accept and receive twenty thousand dollars ($20,000.00) from Harvey Wish who would promise and pay the said money under an agreement and with an understanding that the vote, opinion, and judgment of the said John B. Swainson should be given in favor of John Joseph

Whalen, the Defendant-Appellant in the case of *People of the State of Michigan v. John Joseph Whalen*, a cause and proceeding which would be by law then and there brought before John B. Swainson in his official capacity as Associate Justice of the Supreme Court of Michigan; all of which conduct would be in violation of Title 18, United States Code, Section 1952.

4. It was further a part of the said conspiracy to utilize the telephone as aforesaid for the purpose of facilitating the bribery; that is to say, to inform John Whalen, the party making payment of the said bribe, that the Supreme Court had acted favorably on behalf of John Whalen and that John Whalen should therefore continue in his ongoing endeavor to make payment of Twenty Thousand Dollars ($20,000.00) as aforesaid.

5. It was further a part of the said conspiracy that from on or about the first day of December, 1970, up to approximately the 28th day of February, 1974, in the Eastern District of Michigan, John B. Swainson and Harvey Wish, defendants herein, would devise and intend to devise a scheme and artifice to defraud and for the purpose of executing such scheme and artifice would knowingly cause to be delivered by mail, according to the direction thereon, certain matters or things.

6. It was to be part of the said scheme and artifice to defraud that John B. Swainson and Harvey Wish, would cause the promise of thirty thousand dollars ($30,000.00) and the actual payment of twenty thousand dollars ($20,000.00) to John B. Swainson, an Associate Justice of the Supreme Court of Michigan to influence the vote and opinion of the said John B. Swainson in

favor of John Joseph Whalen, the Defendant-Appellant in the case of *People of the State of Michigan v. John Joseph Whalen*, a legal action then pending before the Supreme Court of Michigan.

7. It was to be further part of the said scheme and artifice to defraud that John B. Swainson would obtain the concurrence of the Chief Justice and certain of the Associate Justices of the Supreme Court of Michigan in favor of the said John Joseph Whalen in part by representation that the vote and opinion of the said John B. Swainson as to be communicated by him to the Chief Justice and Associate Justices of the Supreme Court of Michigan would be the bona fide honest vote and opinion of John B. Swainson on the merits of the said legal action; and John B. Swainson would conceal from the said Chief Justice and Associate Justices of the Supreme Court of Michigan that the said vote and opinion of John B. Swainson would be, in truth and in fact, influenced by the payment of money, and the promise to pay money, as aforesaid, to John B. Swainson.

8. It was to be further a part of the said scheme and artifice to defraud that John B. Swainson, who would be an agent and employee of the State of Michigan, would receive from Harvey Wish as aforesaid, twenty thousand dollars ($20,000.00) as a reward for certain official action to be taken by John B. Swainson as an agent and employee of the State of Michigan; and John B. Swainson would avail himself of such profit without any agreement between John B. Swainson and the State of Michigan that John B. Swainson could and should avail himself of such profit; and John B. Swainson would conceal from the State of Michigan the receipt by John B. Swainson of such profit; and John B. Swainson would knowingly fail to account, in any way, to the State of Michigan for such profit.

9. It was to be further a part of the said scheme and artifice to defraud that John B. Swainson and Harvey Wish, by the payment of money and the promise to pay money, as aforesaid, to John B. Swainson, would influence the conduct of John B. Swainson as aforesaid and would thereby deprive the people of the State of Michigan of the honest, loyal, and faithful services of John B. Swainson in his capacity as an Associate Justice of the Supreme Court of Michigan.

10. It was a further part of said conspiracy that on or about October 24, 1972, for the purpose of executing the said scheme and artifice to defraud, John B. Swainson and Harvey Wish would knowingly cause to be delivered by mail in the Eastern District of Michigan, according to the direction thereon a certain envelope, addressed to Neil H. Fink, Esquire, attorney for John Joseph Whalen, Guardian Building, Detroit, Michigan, from the offices of the Supreme Court of Michigan, containing a notification that the Supreme Court of Michigan had *sua sponte* granted leave to appeal in the case of *People of the State of Michigan v. John Joseph Whalen*, which conduct by John B. Swainson and Harvey Wish, would be in violation of Title 18, United States Code, Section 1341.

11. It was a further part of the said conspiracy that on or about December 22, 1972, for the purpose of executing the said scheme and artifice to defraud, John B. Swainson and Harvey Wish, would knowingly cause to be delivered by mail, in the Eastern District of Michigan, according to the direction thereon, a certain envelope, addressed to Neil H. Fink, Esquire, attorney for John Joseph Whalen, Guardian Building, Detroit, Michigan, from the offices of the Supreme Court of

Michigan, containing a notification that the Supreme Court of Michigan had granted continuation of both pending appeal in the case of *People of the State of Michigan v. John Joseph Whalen*, which conduct would be in violation of Title 18, United States Code, Section 1341.

In Furtherance of the said conspiracy and for the purpose of accomplishing the objectives thereof, the defendants committed, among others, the following Overt Acts:

* * * * *

2. On or about October 6, 1972, Harvey Wish engaged in a conversation with John Joseph Whalen.

3. On or about October 6, 1972, Harvey Wish and John B. Swainson engaged in a telephone conversation with each other.

All of the above in violation of Title 18, United States Code, Section 371.

This is a True Bill.

/s/ P. H. Seeman
Foreman

/s/ Ralph B. Guy, Jr.
United States Attorney
Eastern District of Michigan

/s/ Robert C. Ozer
Special Attorney
United States Department of Justice
940 Federal Building
Detroit, Michigan 48226
Telephone: 313-226-7252

Dated: July 3, 1975

MAY 19, 1975 GRAND JURY TESTIMONY OF JOHN B. SWAINSON

(United States District Court —
Eastern District of Michigan —
Southern Division)

(3) Detroit, Michigan
Monday, May 19, 1975

JOHN B. SWAINSON, was thereupon called as a witness herein, and after having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

Mr. Ozer: Justice Swainson, you are before a United States Grand Jury which is investigating crimes against the United States, specifically interstate use of an interstate facility to further racketeering activity, specifically bribery, associated violations, mail fraud, income tax evasion, false statements on a tax return.

You are not required to answer any question that you feel may tend to incriminate you. Anything you do say will be stenographically recorded, transcribed and used against you, if appropriate to do so.

You are entitled to be represented by counsel at every stage of the proceedings. It is my understanding that you have availed yourself of that right and you are represented by counsel, is that correct?

A. That is correct.

Mr. Ozer: Would you please identify your (4) attorney?

A. My attorney is Konrad D. Kohl, K-O-N-R-A-D K-O-H-L.

Mr. Ozer: And is your attorney outside the Grand Jury room door?

A. He is.

Mr. Ozer: Justice Swainson, you may at any time you wish leave the Grand Jury room before a question, after a question, in the middle of a question, if you like. There will be no restriction whatsoever upon your right to consult with counsel as frequently as you wish, as long as you wish and privately. Do you have any questions about that?

A. No, I do not have any questions about that. I presume your name is Mr. Ozer?

Mr. Ozer: My name is Robert Ozer.

A. That the Press obviously is outside the door and I presume my counsel is outside the door, and you suggest if I feel it necessary to consult with counsel, are you suggesting that I consult with counsel outside the door with the Press present?

Mr. Ozer: Well, I was making the suggestion, Justice Swainson. If it presents a problem to you, we can take a short recess.

A. I don't anticipate that it will.

Mr. Ozer: Let me describe to you the (5) alternative that I can suggest.

Since I recognize that there is that problem, I can make available to you private office space on the 9th floor of this building, if you need it, and that would, of course, be without restriction.

I can also take a brief recess, while I try to make arrangements to have the court direct the marshals to evict the Press. I am happy to do that now, if you like.

I have no authority of my own to simply tell the Press to leave. Otherwise, I would do so.

A. This is the first time I have been on this floor and in such a situation. I did notice that as I arrived I was met by the Press downstairs and they followed me up here from the front door to this room, to the 9th floor back to this room and I presume that's the way it will happen.

Mr. Ozer: What I want to try to have resolved is any question of your right to counsel.

As I say, you have a right to counsel and it will not be abridged by the Press or by anyone else.

A. May I suggest that we face that situation, if it occurs.

Mr. Ozer: Let me ask you, having described to you the alternatives that I have, are you satisfied that you do have adequate access to you counsel?

A. I am. I don't think there is any question of access to (6) counsel.

Is there any water available, Mr. Ozer?

Mr. Ozer: We don't have any here. I am afraid you will simply have to utilize the water fountains as the rest of us do, Justice Swainson. They are out in the hall.

I am trying to decide what to do about the Press.

I am going to suggest a recess of just a minute. Let me see if I can get them out of here without going through the formality of getting the court involved. Let's see how that works out.

Let me suggest that everyone stay where they are for a minute.

(Short pause).

Justice Swainson, I just spoke with your attorneys and what we have arranged is that the rear door opens out within teen feet of an office of the Internal Revenue Service which has been cleared of other personnel and which is available for private consultation with your attorneys. They seem to feel that it's reasonably satisfactory under the circumstances and I commend it for your consideration in the event that you wish to speak with them.

A. Thank you Mr. Ozer.

Examination

(7) By Mr. Ozer:

Q. Now, first, Justice Swainson, on May 13, 1975, last week, I issued a subpoena for your attendance and I had a lot of people spending a lot of time in a lot of places around the State trying to find you. I would like to know where you were.

A. I was in Ann Arbor.

Q. All night?

A. All night.

Q. Where?

A. At a friend's home.

Q. Who is?

A. Murray, Thomas Murray.

Let me say, if I might, Mr. Ozer, I wanted to avoid being commanded to appear before this Grand Jury by a subpoena. As you are probably aware, my tax counsel, Mr. Rubinstein, had made arrangements to accept service of a subpoena, in fact, we had volunteered to be present.

There are going to be some matters discussed before this Grand Jury of a very deeply personal and private nature. I did not expect to be served, I don't think it is at all proper for a person of my position to be commanded. I am a member of the judiciary myself, (8) as you are well aware, and have been the Governor of this State. I would voluntarily appear and I thought my counsel had made that quite clear.

But, as I say, there are some very personal private matters that I am sure you will be examining into so that I wanted to come down personally, I wanted to avoid just exactly what has happened here with all the Press meeting me and being outside the door. Whether that would have been possible or not, I do not know.

Q. Justice Swainson, I am not sure I understand. If, in fact, you are prepared to have your counsel accept service and recognizing that as a result of my understanding, or for whatever reason, that we were in fact attempting to make personal service upon you, and recognizing that you would have come down and you were willing to come down, why did you avoid the personal service?

A. We were awaiting a transcript of a question and answer session of some three and a half hours that occurred on April 30th. As a lawyer, and certainly as a member of the Judiciary, I wished to have a chance to review that particular document with my statements on it to determine whether there had been stenographic error, or any other type of error and we were asking for that right up until that time.

Q. You had a tape recording of the interview, did you not?

(9) A. Well, unfortunately, that tape recording of my counsel was not a true representation of it the day it was taken. He thought he had an instrument, a recording instrument that would record. He had to use a substitute one and the reproduction was very, very bad.

Q. So in any event, you were in fact, for the reasons that you have explained just now, endeavoring to avoid the personal service?

A. You may term it avoiding the personal service. I had no idea I would attempt to be served because of our agreements that we would appear, from the letter that you had written to my attorney.

Q. Did you in fact stay with Mr. Murray for the purpose of avoiding service?

A. I stayed with Mr. Murray for the purpose of not being served, is the way I would phrase it. I felt it would be very bad.

Q. The following day on May 14th, 1975 your attorneys, without any notice to me, traveled to Washington to meet with my superiors in an effort to obtain from my superiors an agreement to continue your appearance before the Grand Jury. Was that done with your knowledge and authorization?

A. It was done with my knowledge that they were going to contact some people in Washington. I don't want to use your phrase "to contact your superiors." They were seeking certain information and obviously were seeking a continuance. (10) We still had not, as you recall, received the document, the question and answer document and did not until the 14th I believe at the end of that hearing.

Q. Did your attorneys discuss with you the fact that they were to endeavor to speak with people in Washington without any prior notification to me?

A. They did not notify me. I thought you had been in contact with them, is the way I understood it.

Q. You had no knowledge that their approach to officials of the Department of Justice in Washington was going to be made without any prior notification to me?

A. I did not. I don't know that to be the fact at this time.

Q. Justice Swainson, I would like to discuss with you a case which was litigated in the Supreme Court of Michigan entitled *People of the State of Michigan* v *John Joseph Whalen*, carried as No. 54199. I take it you are familiar with that case now?

A. Very familiar with that case, Mr. Ozer, as much as I can be.

Q. Do you recall the first contact that you had, the first time that the case in any way made itself known upon your awareness?

A. I have reviewed the minutes of the Supreme Court on this particular case and I have done it with my

colleagues, and I suppose if I answered your question one way I would be aware at some time in September of 1972. But aware of any charge, my involvement was not until March 3 of this year.

(11) I would ask you, what do you mean by awareness of the case? You have, I see, the records.

Q. Do you have any recollection of the case coming to your attention in the course of its progress through the Supreme Court?

A. I receive a copy of the application for leave to appeal, as does every other Justice and I would, in my normal course, review that application for leave to appeal.

Q. And I take it that you are aware that the application came in in September 1972.

A. Well, I am aware that it was discussed at a conference at that time. I don't know when the application came in. It would be sometime before that, I am sure.

Q. That's right, I'm sorry.

You have no recollection at this time that the case in any way captured your individual attention?

A. I do not.

Q. Do you recall in September 1972 discussing the case in any way whatsoever with Harvey Wish?

A. I do not.

Q. Do you recall in September 1972 having Harvey Wish visit your home?

A. I do not recall that, no.

Q. Now from your review of the files, you are aware that the application for leave to appeal came in and it was held for (12) conference by Thomas Giles Kavanagh, then Justice, now Chief Justice?

A. I am aware of the memo that he had circulated asking that the matter be held for conference.

Q. And then I take it that you are aware of, or you are familiar with the notes of the conference of September 5, 1972, concerning the disposition of the court with respect to the application for leave to appeal?

A. As I recall from reviewing them, then Justice Adams moved that it not be granted and I supported that motion.

Q. This you have recalled as a result of a review of the minutes of the conference and you have no independent recollection?

A. Yes, I have no independent recollection of that.

Q. You are satisfied, however, from your review of the minutes that as of September 5th, 1974 — or '72 you were in fact on record as opposed to review by the Supreme Court of this case?

A. Yes, I am aware of the minutes in that regard, yes. I have no independent recollection of any discussion of that case at that time or during that conference.

Q. Are you satisfied the minutes are accurate in this regard?

A. I am.

Q. Do you have any recollection of why you would have undertaken to support Justice Adams' motion that leave to appeal be denied?

(13) A. I do not. I don't recall the case. I don't recall much of the discussion. I am sure from the memorandum that you mentioned that was submitted by Justice Kavanagh and a review of that, that the discussion must have been centered around prosecutorial error in the cross-examination of the alibi witnesses that were supplied on behalf of Mr. Whalen.

Q. You are aware, I take it, that following the denial which occurred formally on September 7th, 1972, the court received an application or a motion for reconsideration of the denial of leave to appeal on behalf of Whalen.

A. I am.

Q. And that the court denied the application for reconsideration without any further conferences on that case?

A. Yes. As I understand the procedure, and this is going back some time and it's been changed since then, this is done I don't think by vote particularly, but by action of the Commissioners. It's really not brought before the court.

Q. Well, the application or the motion for reconsideration was circulated among the Justices, was it not?

A. I am not sure of that, to be quite frank with you, whether it would be or not. It would be prepared and the Commissioners would consider if there were new issues or new matters to be considered but it very well could have been. I just do not know.

(14) Q. In any event, you do not recall any concern by any member of the court at the time of the motion for reconsideration and you recall no interest yourself in the case?

A. I recall none.

Q. And then on the 6th day of October, 1972, the motion for reconsideration was denied?

A. That's what the record shows and I have no reason to dispute that.

Q. Now focusing on this time period of August up until October 6th, 1972, did you have any occasion to meet with Harvey Wish during that period of time?

A. I really don't have any specific recollection and it could very well be true. I have had a casual relationship with Harvey Wish for a number of years. I have had telephone conversations with him. I have discussed with him at times the bail bond system that we have in the State of Michigan. I have discussed personal involvement that my son had in the narcotics area with him. He was a friend, a good friend of a friend of mine, a Senator, Senator Basil Brown.

Q. You say that Wish was a friend of a good friend of yours Basil Brown?

A. Yes.

Q. But Wish was not a good friend of yours?

Q. When I say good friend, I didn't have a one on one personal relationship particularly like visiting his home for dinner (15) and having his family to my home for dinner or anything like that. Harvey Wish is a bail bondsman. I sat as a Wayne County Circuit Judge. I would see him from time to time, as I would see Basil.

Basil is a State Legislator. Basil and I served in the Michigan State Senate years ago, in fact, roomed together at one time and this is where I made the first acquaintance.

Obviously I have been involved in political life for a number of years and I know that Basil Brown has been and a lot of people that I know are involved, so I can't dispute that I didn't talk to him or did talk to him. I am sure I have. I have talked to him quite often.

At one time, and I am trying to tell this as best I can recollect it, the Supreme Court was very interested in the bail bond problem that we have in the City of Detroit, and by that, if I could expand it a little bit, we felt that many people that came before our Recorder's Court particularly, sometimes the Traffic Court, who were granted bond were really granted bond by the judge but in effect it was whether the bail bondsman would take him out, would put up the bond. It didn't matter what the judge said, the judge could say, $1,000.00 bond, but if the man didn't have a thousand dollars he simply wasn't going to be released, and the determination was made (16) by the bail bondsman.

There has been a system tried in Ontario that is somewhat different. A system tried in Illinois that is somewhat different. It was then under consideration by our court in regard of a different system. As a matter of

fact, we at one time were going to establish a committee to inquire into the whole bail bond system to see if there might not be a better way to achieve its purposes, which basically is release of those persons eligible for release without having to come up with sums of money that at times would be impossible for them to do. To that end, I even recommended to our then Chief Justice Thomas M. Kavanagh, that Harvey Wish, if we did establish such a system, be a member of that committee because he could tell what was in this area because of his own experience.

Q. During this period I have asked you to direct your attention to, namely, October 1st to October 6th, 1972, did Harvey Wish visit you at your home?

A. He was at my home. I don't know specifically that it would be in that time but it could very well be.

Q. Why was he at your home?

A. He came out visiting. This was not an unusual thing. Well, it was unusual, too, that he would come out to visit. I am trying to recall whether my son was home at the time, my son Steven. That time period, August to October, would (17) be a pleasant time of the year and I am sure I would have said, "Come on out," if he had suggested or I suggested. He said, "I want to talk to you."

I have talked to Harvey Wish, as I have said, I am sure you know, Mr. Ozer, he was having some problems with various criminal charges at the time, as I ecall.

Q. What was the time frame?

A. It seems to me it was about this time that he was being charged with mail fraud, I think, and that he would secure the names of those persons who had been appointed notary public and then solicit those persons to sell them a bond. A person cannot be a notary public after appointment until they post a bond, a very minimal bond, as I recall, about ten dollars. He would

seek from the various county clerks the names of those persons who had been so appointed and then write them a letter. As I recall, the discussion was around whether or not he had the authority to do that from the underwriting company.

Q. So do you feel that his visit to you, if in fact there was a visit, during the period August to October 6th, 1972 in some way related to his own difficulties with the law?

A. Yes, I do. This seemed to be mostly on his mind. I think he was being charged in Wayne County, I think in Washtenaw County, where I live, and I think in Hillsdale County to (18) the best of my knowledge.

Q. Did he, during this period of time, August 1 to October 6, 1972, make any gifts of any kind to you?

A. He did not.

Q. Did he make any purchases for you?

A. Yes, I think we have discussed one of them. Well, it wasn't a purchase. It was having some embroidery done on some little nylon jackets.

Q. Anything else?

A. There has been, throughout the time that I have been aware of this case, a box being mentioned. Now whether this is the time frame or not, I do not know, but I do know what is being talked about in that regard.

Q. What?

A. Apparently there was purchased, I know there was purchased a wall hanging at Hudson's, J. L. Hudson's, and it was on my behalf and he picked it up for me and I paid him for it.

Q. How much money?

A. To the best of my recollection, something like $135.00.

Q. Where did you pick it up?

A. I think right in front of the Detroit Police Station or the parking lot across from the police station, to the best of my recollection.

Now let me say, Mr. Ozer, this has been a matter that I have been aware of since I was first contacted (19) on March 3rd in relation to the subject matter that I am being examined on. I have tried from that time to the present, by the nature of questions and Special Agents of the Internal Revenue Service, to determine what was being talked about. I absolutely couldn't remember and it was only this Saturday when I was driving home from after a visit with my attorney, going over the question and answer period of April 30th, that I recalled this.

Q. Well, let's try to clarify then when, if at all, you are talking about that.

Aside from the wall hanging and the embroidery of the jackets, and you also mentioned to the Internal Revenue Service that a lunch might have occasionally been paid for by Mr. Wish. Were there any other gifts from Mr. Wish?

A. There were not.

Q. Were there any other purchases on your behalf made by Mr. Wish?

A. No.

Q. Specifically, if in fact, well, you have mentioned now that you think it likely that Mr. Wish did come to visit your home during that fall, the period that I have directed your attention to. Did he bring any parcels of any type with him to your home?

A. He did not.

(20) Is it all right if I smoke, Mr. Ozer?

Q. Yes, it is.

A. May I borrow an ashtray?

Q. Do you have any recollection of what occurred, well, let me try to more carefully focus your attention, if we can, I am going to direct your attention to September 16, 1972 and ask you if on that occasion Mr. Wish didn't bring several parcels to your home.

A. September 16th?

Q. 1972.

A. I have no recollection of Mr. Wish bringing any parcels to my home.

Q. And to the best of your recollection he brought nothing to your home in September 1972?

A. He did not.

Is it all right if I make a note of that date, Mr. Ozer?

Q. Of course.

So that we are clear on the nature of your statement, Justice Swainson, is there anything at all hazy or uncertain about the possibility that Wish did or did not bring parcels in the form of gifts, deliveries, or what have you to your home in 1972, or do you feel quite clear in your mind that that did not occur?

A. Well, I am hazy, I will admit that, because of the time from (21) now until then. I am sure you are talking about parcels, I don't know whether he will bring a bag of bagels or something like that. I can't imagine it, but he possibly could have.

Q. So other than, you know, something in the way of a delicacy, in the way of a courtesy upon visiting your home, you feel that he did not bring anything else?

A. He did not.

Q. On October 6th, 1972, did you have occasion to speak on the telephone with Harvey Wish, concerning the Whalen appeal?

A. I have no recollection of ever talking to Mr. Wish about the appeal. October 6th, 1972? I have talked to Mr. Whalen and on the phone but I can't recall talking to him about the appeal.

Q. You just said you talked to Mr. Whalen on the phone, I assume you meant Mr. Wish?

A. Yes, I'm sorry, I did mean Mr. Wish. I don't know Mr. Whalen.

Q. Again, Justice Swainson, you used the term you don't recall. I want the record to be clear whether you feel there is any, you know, doubt or uncertainty in your mind, whether you had occasion to speak with Wish about the Whalen appeal while it was being considered by the Supreme Court.

A. I have no recollection of that, Mr. Ozer, at all.

Q. Now you are aware that the minutes of October 17, 18, 1972 (22) of the Supreme Court of Michigan reflect a motion made by you and supported by Justice Thomas G. Kavanagh that the court having denied leave to appeal and rehearing in the Whalen case sua sponte granted the application to reconsider and hear the Whalen appeal?

A. I am aware of that.

Q. What caused that motion to be made?

A. That I am not clear on. I have examined the minutes of that particular day in great detail. That case was not on the agenda for that date but is represented on those notes as a non-agenda item. The agenda is prepared by the Chief Justice and is served upon the members of the Court some time before the conference, whether it be an opinon conference or administrative conference, some days before.

There are other items that come on as non-agenda matters. This appears on that document as a non-agenda matter. I have no idea how it came to be on there.

Q. Why did you make the motion to grant leave to appeal sua sponte?

A. I am not absolutely sure I did, even though I am recorded as having done so. When we meet in conference, we meet as an entire court without anybody else present and our then Chief Justice Thomas M. Kavanagh, who is now deceased, kept his record by longhand of actions taken on the various (23) items on

the agenda, and his way of acting at that time, when discussions occurred on any particular matter, would be to designate who makes the motion and who seconds the motion. Now this could be a reflection of inactual action or it could be his understanding of who was talking in favor or not in favor of any particular action, and I do not have a recollection, a personal recollection of making that motion.

Q. Do you have a recollection of several days prior to the motion visiting Harvey Wish at his office?

A. I did not.

Q. Did you do so?

A. I don't think so.

Q. Do you have a recollection —

A. Now this is several days prior to October 17th?

Q. Yes.

Specifically on October 13th, 1972, did you visit Harvey Wish at his office and leave carrying a package?

A. I visited Harvey Wish at his office carrying a package?

Q. Did you visit Harvey Wish's office and leave carrying a package that you did not carry when you went in?

A. I have no recollection of doing that, Mr. Ozer.

Q. Is it your belief that you did not do so?

A. It would be unless it would be related to those jackets that (24) have been discussed but I can't recall that at all.

Q. Well, with respect to the jackets, let's see if we can't lay them to rest.

For the purpose of refreshing your recollection, I am showing you a photocopy of a check which I will have the court reporter mark as Exhibit 1 and today's date and your initials.

(Whereupon a check to Detroit Knitting Mills, dated 8/19/72, in the amount of $43.42 was marked Grand Jury Exhibit 1).

Q. (By Mr. Ozer, continuing): This purports to be a check drawn on the International Bonding Agency, signed by Harvey Wish, to Detroit Knitting Mills in the amount of $43.42 with a notation on it for four jackets. Does that roughly comport with your recollection of the time at which Harvey Wish arranged to have the jackets embroidered for you?

A. Roughly. 8/19 is August 19th.

A Juror: Mr. Ozer, some of the Jurors in the back can't hear.

Q. (By Mr. Ozer, continuing): Having inspected that document, whether or not it's of any assistance to you, I would ask you whether you would still feel there is any possibility that as of October 13th or on October 13th, 1972 you would (25) be picking up those jackets at Harvey Wish's office?

A. It would seem from inspecting the exhibit that you have handed me that was written in August, I probably would have picked them up somewhere before October 13th.

Q. By the way, is that where you got them? Did you pick up the jackets at his office?

A. I don't have any recollection. I purchased the jackets. I wanted to have an embroidery done on the back of the jackets and he assisted me in that.

Q. Now asking you again, did you or did you not on October 13, 1972, a few days before the sua sponte motion, visit Harvey Wish at his office and leave carrying a package?

A. I have no recollection of doing that at all, Mr. Ozer.

Q. Do you have any recollection of speaking during October 1972 with Harvey Wish about a painting that you desired and in fact receiving a painting from him that month?

A. In October 1972?

Q. Yes.

A. Other than this wall hanging that I have described, no.

Q. Are you able to, by means of review of your own records, ascertain the date upon which you actually received the wall hanging from Harvey Wish?

A. I have no records in that regard at all.

Q. Did you reimburse him for it?

A. I did.

(26) Q. By check?

A. By cash.

Q. In any event, following the sua sponte motion, well, on October 17th or 18th, let's try to clarify that. The minutes of the court are simply dated October 17th-18th, 1972; are you able to acertain whether the Whalen motion was made and carried on the 17th or the 18th?

A. I am not. I can't explain the 17th-18th, either.

Q. Well, in any event, following the motion the motion was carried and leave was granted, was it not?

A. Yes.

Q. Do you have any knowledge of whether there would be publicly available within two or three days of that motion the information that the court had made and carried that motion?

A. Would you rephrase that? I don't think I understand your question.

Q. Would there be publicly available on or before October 20, 1972 the information that the court had — that in the conference of the court a motion had been made and carried to grant leave to appeal on the Whalen case?

A. I don't know.

Q. Well, specifically did you have occasion on October 19th, 1972 to telephone Harvey Wish at his office and leave a message for him to the effect that the court is entering a — or granting leave to appeal in the Whalen case?

(27) A. I have no recollection of doing that at all, sir.

Q. Justice Swainson, you have used the phrase on several occasions with respect to matters that are of some considerable importance, the phrase I am referring to is that you have no recollection. You have, I suspect, discerned that I am directing your attention to incidents of alleged or believed involvement on your part with Harvey Wish, at times bearing a critical relationship to the timing of the Whalen case through the Supreme Court, and on these various matters the visit to the home in September with packages, the visit to the office several days before the sua sponte grant, the telephone call within two or three days of the sua sponte grant, and when you say you don't recall that do you feel that it happened and that it just slipped your memory?

A. No, I don't feel it happened. This is my problem, I have no recollection. I don't recall discussing this case and that's what I am saying.

Q. What I am asking you is, when you say you don't recall these specific incidents that I am directing your attention to, is that terminology to you meaning that you do not believe that it happened or you do not believe that Harvey Wish brought you parcels in September, you do not believe you went to his office and picked up a

package on October 13th, and you did not go to the office and pick up a parcel (28) on October 19th, is that what you are saying?

A. I am saying, I have no recollection of this. I mean that exactly. It might have been those jackets. It wouldn't seem possible. It might have been that wall hanging. It could well have been. I could have made a call. I can't imagine myself telling him something like this unless I was asked. I don't know.

Q. Then, if Mr. Wish had asked you about the Whalen case, you would tell him that the court had in conference decided to enter an order granting leave to appeal?

A. If he had asked me something like that, I probably would have said it. I can't, you know, I have been going over this myself, obviously, ever since I have had this allegation lodged against me. I have tried to recollect any conversations I have had with Harvey Wish. To the best of my ability to recollect, they involved his own personal involvements. He might have been asking me something, I don't know. Certainly this case was not that impressive a case in one way or another before the court.

Q. Let me ask you this and hopefully your recollection will be clear on this. As of October 17th or 18th, specifically after the time the sua sponte motion was made in your conference, that is the conference of the court, were you in any way motivated to facilitate review of the Whalen case because of any request or conversation with Harvey Wish (29) relating to the Whalen case?

A. No, I was not.

Q. And you have never spoken with Harvey Wish or received anything from Harvey Wish that had specific reference to rewarding you for proposed, present or past conduct relating to the Whalen case?

A. I have not.

Q. You are aware that the leave to appeal pursuant to the sua sponte motion that was carried in October was, that is, leave to appeal was actually entered on October 24th, 1972?

A. Yes, I am sure that's printed on there. I don't know.

Q. Following the leave to appeal in late October 1972, did you have any further involvement with the case?

A. I did not.

Pardon me. Pardon me, I did.

I believe on December 22nd or 23rd that there was an order entered on this matter continuing bond pursuant to an application for bond pending appeal. I think that's in the court's records on this.

Q. What was your nature of involvement on that?

A. I submitted a memo of two lines saying I did not think I understood the charges that were appended to the Commissioner's Report, which I think you have before you which is in the nature of a computer printout sheet.

Mr. Ozer: I'm going to ask the Reporter (30) to mark this as Exhibit 2 with today's date and initials.

(Whereupon a copy of Commissioner's Report was marked Grand Jury Exhibit 2.)

Q. (By Mr. Ozer, continuing): Handing to you the document the Reporter has marked as Exhibit 2, Justice Swainson, do you recognize that as an accurate copy of the Commissioner's Report relating to the motion for bail in the Whalen case?

A. I do.

Q. Do you see attached to it the document you described as relating to the criminal record of Mr. Whalen?

A. I do.

Q. What was the nature of your question or confusion concerning his criminal charges?

A. Well, in reading the computer printouts, as I have had the opportunity to do from time to time, there appears many times to be duplications of offenses. One offense being the arrest and then at a later time another action having been taken by the court would appear, and then another action having been taken by the court on the same matter would appear and it would give you the impression, when you look at one of these, that there is a long list of offenses when in fact there are many entries on the same offense.

Q. Well, specifically what was your question as to the Whalen (31) case?

A. That was my question, were these all related to one offense or more than one offense.

Q. Now the process, if I understand correctly, whereby the motion for bail was being handled by the court, as I think was the process whereby all motions were handled, is that in the first instance the Commissioners who are employees or officials of the court review the motion and write a memorandum to all the judges in the form of a report which in this case you are holding in your hand?

A. That is correct.

Q. And in the report the Commissioners make a recommendation and advise by means of that copy that is sent to each of the Justices that an order, consistent with their recommendation, will be entered unless any Justice holds the matter for conference by means of some sort of a memorandum?

A. That is correct.

Q. And the date that the — the recommendation of the Commissioners in this case was that bail should be denied, is that right?

A. That is correct. Immediate consideration granted and bond denied.

Q. And the date upon which that order would have been entered had no Justice intervened was November 17th, 1972, correct?

A. That is correct.

Q. And it was on November 16th, 1972 that you forwarded a two (32) sentence memorandum which reads:

> "Hold for conference. I am not sure I completely understand the charges involved."

That was the content of your memorandum, was it not?

A. I am sure it is.

Q. And had you not submitted that memorandum on the day following, that is, November 17th, 1972 an Order would have been entered by the Court denying appeal bond?

A. Well, generally that would be true but as I understand the working of the Commissioner's Office, they don't exactly do that. They hold it a few more days in case somebody has a late memo in that that's what the recommendation is.

Q. In any event, absent an unoficial or informal delay of a couple of days, your memorandum was entered the day following — the day prior to the date that an order denying bail would have been entered?

A. Right. I read all of these as they come through and try to comply with the provisions of the recommendations.

Q. When you were interviewed by Special Agent Naropi on April 30th, 1975, well, before I get to that.

After the holding memo was the matter held for conference?

A. I presume so.

(33) Q. And what occurred at the conference?

A. Well, as I recall, from having reviewed the file, we granted bond. I don't know whether we granted bond. It seems to me we continued bond. He was already out on bond.

Q. And do you know who moved for the bond?

A. I am recorded as having moved that and I think it's November 22 or November 23rd — or December 22 or December 23rd.

Q. It's December 21st, 1972, Justice Swainson.

At this point are you satisfied that you did in fact make the motion for the bond.

A. Well, I am satisfied that I am recorded as having done it. I am also, in discussing this with my colleagues, satisfied that that was the day we had our annual Supreme Court Christmas party and that we worked on matters in the morning, we worked on matters in the afternoon and the same situation obtained, we had discussions. What do we do with this? What do you think? We put it down. I couldn't tell you if I made it, if I was recorded as having made or somebody else made it, I just don't know.

Q. So as with the sua sponte motion, notwithstanding the fact that you appear in the court's docket as having made the motion, you have no recollection of whether or not you made the motion or participated in it?

A. I know I participated in it because of the use of the word sua sponte. This is of the court's own volition. No one (34) is recorded as opposing, I guess, or dissenting. I think at that particular time sequence that you are talking about there, Justice Black didn't participate in any of these because he was leaving the bench as of December 31st, 1972 and would not be present to consider them and felt that his participation was not necessary.

Q. As to bail, Justice Adams and Justice Brennan dissented.

A. I was thinking of the sua sponte, the one of October 17th or 18th. The bail wasn't sua sponte, was it?

Q. No.

As to the actual, well, as to participation, what I meant is with respect to making the motion or seconding the motion you really in both instances, both bail and the sua sponte granting of leave, don't have any feeling one way or another as to whether or not you actually made the motion or seconded it, the only thing you feel confident you did is voted in each case?

A. Right.

Q. In your interview with Mr. Naropi on April 30, 1975, I believe you mentioned at that point in your interview that you recall continuing interest and I think you used the term "agitation," although I have not been able to lay my finger on it at the moment, of Thomas Giles Kavanagh, does that —

A. I what?

(35) Q. Do you recall discussing the continuing interest end, I believe you used the term "agitation" on the part of Thomas Giles Kavanagh in this case?

A. I don't recall ever using that word agitation. There was a continuing interest in this matter by Thomas Giles Kavanagh who was an associate Justice at this time.

I think in that statement, and I couldn't call the place either, that there were three main issues involved in the particular case and different Justices had different interest in the issues.

One being the use of a person's prior conviction record during the time of the trial for a separate or subsequent offense.

The other being what we refer to as the Tanner issue.

The third being the prosecutorial misconduct in this particular case.

I obviously have familiarized myself with the case since this allegation has been made. As to the first, I am saying this for the benefit of the Jury, and not necessarily for you, Mr. Ozer, who I am sure is quite aware of prior conviction records, if a person at 17 years of age, perhaps, had gotten in trouble with the law, maybe stealing a car or any number of things, and then maybe five years later or ten years later is involved again (36) in another crime for which he is being tried, if he takes the witness stand, under our system in Michigan for the purpose of testing his credibility, the prosecutor is allowed to ask whether or not he committed that prior crime. Well, it has no relevance, of course, as to the charge which he is then facing but it certainly does, in the opinion of some of us, prejudice that partricular defendant before the jury where they might conclude at some time in their jury deliberation that having done this earlier thing he would have a propensity to do the later thing. That has been a continuing interest of mine, as a matter of fact, on the Supreme Court that the person should be able to be charged with the offense that is there and tried on that offense without reference to things he has done in the past. That was one of the issues in this particular case and obviously one of the reasons why Mr. Whalen was advised not to take the stand because of this latter extensive prior record.

The second issue in this case, one which Thomas Matthew Kavanagh was interested in, we refer to as the Tanner issue. A case written just about this time that was making an expression of the Supreme Court, that under the statutory scheme of sentencing which provides for a minimum and a maximum, that as a matter of policy the minimum sentence cannot exceed more than two-thirds (37) of the maximum sentence.

Now the Legislature has provided for both minimum and maximum sentences. We have had the experience where a judge will sentence someone to nine years, 11 months and 29 days to ten years, and it is our view that that is defeating of the Legislature's intent to have a minimum and maximum sentence.

The third issue in this case, Thomas Giles particularly was interested in, dealt with the cross-examination of two witnesses that were produced by Mr. Whalen as his alibi witnesses. Mr. Whalen in this particular matter was charged with the breaking and entry and larceny from a jewelry store in Adrian, Michigan. His defense was that he wasn't there and to establish that defense he produced two women at the trial.

At the time the prosecutor, well, let me back up. The women reportedly were going to testify that he was at the Atomic Bar at the time the breaking and entering took place.

As the one woman got on the stand the prosecutor in that particular county at the time of cross-examination, I presume, engaged the woman in a conversation that, as I recall from reading the case and obviously I have reviewed it very carefully, said, "You don't like me, do you, Mrs. So and So?"

(38) She said, "Well, I like you about as much as you like me."

"Now," he said, "you really don't like me because I represented your husband in a divorce case, isn't that right?"

She said, "Well, yes, you did represent him in a divorce case."

"Well, he got the divorce, didn't he?"

"Well, yes, he got the divorce."

"The reason he got the divorce is because you sleep with this other woman, the other alibi witness?"

Of course, then that was denied.

She said, "No, I live with that other woman."

And then the prosecutor went one step further and said, "Well, that isn't quite right, is it? Isn't that why the divorce was granted, because of your sexual preference?"

Well, now whatever was the cause of that particular divorce, whatever the reason I don't know, but it certainly had no relevance as to whether or not this defendant was in the Atomic Bar on that particular night, and that was the prosecutorial misconduct which was commented on by the Opinion in this particular case.

Q. On October 6, 1972, did you return a telephone call to (39) Mr. Wish at his office and did he on that occasion read to you a portion of the pending application for leave to appeal?

A. October 6th, 1972?

Q. Yes.

A. I have no idea that that happened, Mr. Ozer.

Q. In your interview on April 30th, 1975, Mr. Naropi asked you:

> "In the year 1972 or the year 1973 did you have any discussions with Harvey Wish and these discussions would relate to John Whalen?"

Your answer was, "I did not."

Now is that your answer today?

A. That is my answer.

Q. And then, further, within a few seconds Mr. Naropi asked, "During any calls that you would have received from Harvey Wish during the year 1972 and 1973, do you remember having any conversations with Mr. Wish that would relate to the case of John Whalen?"

> "I do not."

That is still your testimony?

A. Those would still be my recollections.

Q. Justice Swainson, following the granting of bond in the case, there was nothing left to be done which in fact was done in due course except oral argument and ultimately the decision by the court, is that right?

(40) A. That's right.

Q. And the actual Opinion of the court was entered on December 18, that's the Mandate, yes, December 18, 1973, the Opinion and Mandate was entered by the court, correct?

A. I presume so. The decision and Mandate, that's not a familiar term to me.

Q. That may be terminology that is used in Federal Appellate cases.

(Whereupon a document entitled Opinion was marked Grand Jury Exhibit 3).

(Whereupon a document entitled Order was marked Grand Jury Exhibit 4).

Q. (By Mr. Ozer, continuing): I am handing to you an Opinion marked as Exhibit 3 and an Order marked as Exhibit 4, and ask you if you recognize them as accurate copies from the file of the Supreme Court?

A. I do.

Q. And if I understand correctly, and the dates are December 18th on both documents, are they not, 1973?

A. December 18th, 1973.

Q. At the time the Opinion was signed you initially have indicated you were not going to participate in the decision for one reason or another but ultimately did sign the Opinion, (41) can you clarify what that was about?

A. I was planning on going on a hunting trip. I think this Opinion was prepared, this has been in discussion with Thomas M. Kavanagh since this began, and would have been away during that time and it was first prepared with me not participating. I was not away at the time and I signed. That was my best recollection of the event. I

have tried to think of any other reason and I cannot and that is his recollection, or that was his recollection.

Q. When did Thomas M. Kavanagh express that opinion?

A. I think about March 17 when I visited him in the St. Lawrence Hospital.

Q. Did you have occasion before the Opinion was signed, specifically on October 15th, 1973, to receive a television set from Harvey Wish?

A. I did not.

Q. Did you receive a large carton that looked like a television box?

A. On October 15?

Q. Yes.

A. I did not.

Mr. Ozer: Mr. Reporter, I would like you to read to Justice Swainson the testimony of Mr. Holloway before this Jury on May 15, 1975.

I would instruct the Reporter to include (42) in Justice Swainson's transcript a verbatim account of anything that is read to Justice Swainson while in the Grand Jury room.

"Q. Mr. Holloway, would you give us your full name, please?

"A. Melvin Holloway.

"Q. How long have you lived in the Detroit and Detroit metropolitan area, sir?

"A. I was born and raised here.

"Q. You are a lifelong resident of this area, is that correct?

"A. Yes.

"Q. Mr. Holloway, calling your attention to the date of October 15, 1973, were you employed as a parking lot attendant at Switzer's Restaurant in Detroit, sir.

"A. I was.

"Q. Where is it located?

"A. It's 260 Switzer Place.

"Q. It that right off of one of the major avenues?

"A. It's right off of Jefferson.

"Q. That's in the City of Detroit?

"A. Yes, it is.

"Q. Mr. Holloway, what duties were you attending to as a parking lot attendant on that date, sir?

(43) "A. Well, as the people come in for lunch, I park their cars.

"Q. Are you acquainted with John B. Swainson who is one of the Justices of the Michigan Supreme Court?

"A. I am.

"Q. Did you see Mr. Swainson on that date, that date being October 15, 1973.

"A. Well, he came into the restaurant. He was by himself. I parked his car and he told me that a guy would come and put something in his car and he went into the restaurant.

"Q. Then Mr. Swainson drove his car into the restaurant?

"A. No, he arrived in the car. I parked the car.

"Q. He arrived in his car and you parked it?

"A. Yes.

"Q. What kind of a car was he driving that day, as far as you recall?

"A. It was a black four-door Oldsmobile.

"Q. After Mr. Swainson made that remark to you and went in the restaurant, then what happened?

"A. Another gentleman came in and told me that he was going to put something in Swainson's car, and then he went into the restaurant but he came out first before Swainson did. I pulled Swainson's (44) car down to his and he put a box in Mr. Swainson's car.

"Q. This individual that you are indicating you assisted, whom you assisted to put a box in Mr. Swainson's car, had you ever met that person before?

"A. No, I hadn't.

"Q. You had never been introduced to him, is that correct?

"A. No, I hadn't.

"Q. Can you describe the box in question?

"A. Well, it was a big box. It was too big for one man to handle. We tried to put it in the trunk and it was too large for the trunk and we had to put it in the back seat.

"Q. Did you notice any markings or name on the box?

"A. Well, I don't remember the name but it was a TV. It had not been opened.

"Q. It appeared to be a sealed box that indicated there was a television inside, is that correct?

"A. Yes, sir.

"Q. And that box was put into the back seat of the car by this gentleman and yourself, is that correct?

"A. Yes, we tried to get it in the trunk, but it wouldn't close so we put it in the back seat.

(45) "Q. After the box was placed in the back seat then what happened, sir?

"A. Then this fellow left and then I brought Mr. Swainson's car down in front of the door so he wouldn't have so far to walk, and I took him his keys and then I had lunch.

"Q. Did you have any conversation with Mr. Swainson after you pulled the car up to the door?

"A. When I took him his keys, he asked me if I got that in his car and I told him yes, and I gave him the keys and went and had lunch.

"Q. What specifically did you ask him about the box?

"A. I didn't ask him. He asked me when I handed him the keys, did I get the box in the car? I told him, yes, we had to put it in the back seat.

"Q. Did you make any further comments about the box at that time?

"A. No.

"Q. Did you see the car again that day, sir?

"A. Well, when he left he didn't come back.

"Q. So he left the restaurant after that conversation?

"A. Not at that moment. He didn't leave then because he was with some other gentlemen. When I gave him his keys, then I went and had my lunch and maybe an hour or two he left after that, I don't know.

(46) "Q. That was the last contact you had with him on that date, is that correct?

"A. Yes."

Q. (By Mr. Ozer, continuing): Will you please explain that incident, Justice Swainson?

A. I can't explain that incident, Mr. Ozer. I have no recollection of it at all.

Q. Did it occur?

A. I am shocked here. That's what I am saying. It did not occur as far as I know. I know a parking lot attendant named Mel.

Q. And is the testimony that you have just heard inaccurate or incorrect in any way?

A. As far as I am concerned, it's inaccurate, Mr. Ozer.

Mr. Ozer: Mr. Reporter, would you please read to Mr. Swainson the testimony of Edmund Diem before this Jury on May 15th, 1975 and, again, include whatever is read to him in the transcript of his own testimony.

"Q. Mr. Diem, would you give us your full name and your occupation at the present time?

"A. My name is Edmund Diem and I am a Special Agent with the FBI.

"Q. You are assigned to what office at the present time?

"A. To the Detroit Office.

(47) "Q. Sir, during the year 1973 were you a Special Agent assigned to the Detroit Office of the FBI?

"A. Yes, I was.

"Q. Calling your attention now, sir, to the particular date of October 15th, 1973, were you so engaged in your duties?

"A. Yes, I was.

"Q. Did you make certain observations at that time, sir, respecting one John B. Swainson?

"A. Yes, I did.

"Q. Sir, would you tell me what you saw at or about the premises of Switzer's Restaurant on that date in the City of Detroit, Michigan?

"A. I was involved in a surveillance on that day of John B. Swainson and about 12:30 that afternoon John Swainson, driving his car, arrived at Switzer's Restaurant. It was parked for him and he entered the restaurant at about 12:30. Approximately 1:50 or 2 o'clock I noticed also, at the same time we noticed a vehicle belonging to Harvey Wish, a bail bondsman from Detroit, parked in the parking lot.

"Q. You say 'we', sir, were there other Agents?

"A. Yes, there were other Agents involved in this surveillance.

(48) "Q. So some of your testimony consists of your own observations and the observations of other FBI Agents on that date as those observations were related to you, sir?

"A. That is correct.

"Q. Go ahead.

"A. As I was saying, we noticed Harvey Wish's vehicle in the parking lot, also. Justice Swainson entered Switzer's shortly after he did.

One of our Agents, two of our Agents, excuse me, I remained outside. Special Agent Mike Leyden later reported that he noticed that Justice Swainson and Harvey Wish, the bail bondsman, were together at a table in Switzer's having lunch.

Meanwhile, back outside at about 2 o'clock, I think it was, and I would like to refer to my notes, if you don't mind. I have a copy of the notes we kept that day. At about 1:50 or 2 o'clock the parking lot attendant went to Swainson's car and drove it near Harvey Wish's car. He opened the trunk of Wish's car and started removing a large box, a cardboard box. Obviously it was heavy. He was struggling with it.

Shortly after that, Harvey Wish himself appeared out of the restaurant and assisted the (49) parking lot attendant in removing the box from the trunk of Wish's car. They tried to place it into the trunk of Swainson's car. It did not fit in Swainson's car because it was too long so they ultimately placed it in the back seat of Swainson's

car. Shortly after that, Harvey Wish departed in his vehicle and the parking lot attendant reparked Swainson's car in the slot and continued with his normal duties.

Later that afternoon, when the crowd thinned out, the Agent inside reported that the parking lot attendant entered the restaurant, approached John Swainson and handed him the keys to his car, and according to his notes here and from talking to him, he stated that there was an overhear in which, something to the effect, Swainson asked the parking lot attendant, 'Did you make the exchange all right?'

The parking lot attendant said, 'Yes, sir,' gave Swainson the keys, and I think Swainson tipped him a dollar.

"Q. Did you happen to notice the make of the automobile or did Agents under your direction reporting to you happen to notice the make of the automobile that John B. Swainson was driving October 15, 1973 (50) and into which the box item was placed?

"A. I believe it was an Oldsmobile. We ran the license check and I believe it came from the Michigan State Legislature and that was the black Oldsmobile.

"Q. Are you aware that there was a parking lot attendant that assisted Mr. Wish in placing the box in the car and are you familiar with him.

"A. Yes, I am familiar with him.

"Q. Who is that person?

"A. Melvin Holloway."

Q. (By Mr. Ozer, continuing): Justice Swainson, having further refreshed your recollection by the testimony of Special Agent Diem, can you explain the incident?

A. I cannot.

I would ask, Mr. Ozer, for a recess at this time to consult with my attorney.

Mr. Ozer: You may certainly be granted that.

The record will reflect that Justice Swainson has left the Grand Jury room.

We will take a short recess until he returns.

(Whereupon a recess was had).

Mr. Ozer: Let the record reflect that Justice Swainson has reentered the Grand Jury room having (51) been absent for approximately 15 minutes.

You are reminded, Justice Swainson, that you are still under oath.

A. I recognize that, Mr. Ozer.

Q. (By Mr. Ozer, continuing): Directing your attention once again to October 15, 1973, I ask you to explain the incident that has been testified to by Mel Holloway and Special Agent Diem.

A. Mr. Ozer, on the advice of my counsel I am going to refuse to answer questions in this area until such time as he has had an opportunity to do investigation in this matter.

Q. Justice Swainson, I will advise you at this time that your ground for refusal is not legally cognizable. You may refuse to answer any question which you feel may tend to incriminate you. A refusal on any other ground will be then taken before the court immediately.

A. I shall refuse to answer the question on the grounds that it may tend to incriminate me.

Q. Is it your intention to refuse to answer any further questions relating to the incident of October 15, 1973 on those same grounds?

A. It is.

Q. Are you willing to answer further questions on other dates, other occurrences, all relating to the same general subject matter of this Grand Jury's inquiry?

(52) A. I would have to consult with my counsel in that regard and so advise you, Mr. Ozer.

Q. Is it your desire to do so now or shall I ask questions?

A. It would be my desire to not answer further questions but be available to you, if that's what you wish, to answer such questions but only after consultation with counsel.

Q. Well, you may have consultation with counsel.

A. And a chance to investigate the matters.

Q. Is it your intention to assert your Fifth Amendment privilege to all other questions today?

A. It is.

Q. Is it your position, however, that you may be willing to answer questions at a later date?

A. It is.

Q. Can you at this time advise me of the date upon which you anticipate that you will or might be prepared to once again waive your Fifth Amendment privilege?

A. I cannot advise you of that at this moment. It would be within a few days.

Mr. Ozer: Under those circumstances, Justice Swainson, I will excuse you for today and instruct you to return at 10 o'clock Wednesday morning, two days from now, and let me inquire of you whether it is your intention to return to the Grand Jury at that time without the service of another subpoena, or do you consider yourself (53) still under the process of this Grand Jury subpoena?

A. I consider myself still under the process of this Grand Jury and it will not be necessary to serve me with any further subpoena.

Mr. Ozer: Let's leave it at that, then. You are excused for today.

(Whereupon the witness was excused).

Certification

I, Herman H. Tappert, Official Court Reporter, United States District Court, do hereby certify that I have recorded stenographically the proceedings had and testimony taken in the above-entitled matter before the Grand Jury, and that the foregoing transcript, consisting of fifty-three (53) typewritten pages is a true and correct transcript of the proceedings.

HERMAN H. TAPPERT
731 Federal Building
Detroit, Michigan 48226

APPENDIX D

MAY 21, 1975 GRAND JURY TESTIMONY OF JOHN B. SWAINSON

(United States District Court —
Eastern District of Michigan —
Southern Division)

(2) Detroit, Michigan
Wednesday, May 21, 1975
10:00 a.m.

JOHN B. SWAINSON, was thereupon called as a witness herein, and after having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

Examination

By Mr. Ozer:

Q. Justice Swainson, again, I advise you that you are before the United States Grand Jury. The nature and purpose of the investigation was described to you on the occasion of your appearance here two days ago. You are not required to answer any questions which may in any way tend to incriminate you. Anything you do say is being stenographically recorded and transcribed and used against you if that is appropriate to do, and you are entitled to be represented by counsel at all stages of the proceedings. It is my understanding you have exercised that right, and your attorney, Mr. Kohl, is outside the Grand Jury room. Is that correct?

A. That is correction.

Q. As on the occasion of your previous appearance before the (3) Grand Jury, you have an unrestricted right to consult with Mr. Kohl. You may leave the Grand Jury

room at any time before, after, or even in the middle of the question and stay with him as long as you wish and meet with him privately. Quarters for that purpose have been arranged as they were two days ago immediately adjacent to the Grand Jury room. Do you understand everything I have said?

A. I understand what you have said, Mr. Ozer.

Q. Having advised you in that regard, I would now direct your attention back to October 15, 1973, the date upon which your attention was directed two days ago and would you please relate to the Grand Jury any explanation you might have regarding the testimony that was read to you by two other witnesses concerning your activities on that day?

A. Mr. Ozer and members of the Grand Jury, I have had an opportunity to consult with my attorney regarding the matters upon which I was questioned two days ago. At that time it was related to me by the then Court Reporter of the statement of Mr. Melvin Holloway and the statement made by Mr. Edmond Diem, I believe, a Special Agent for the FBI. I can only say that I do recall the events that they testified to as they testified to them. By that, I simply mean that the box that was transferred to my car was transferred to my car from the car of Harvey Wish.

(4) You asked me further, Mr. Ozer, about the parcel on September 16, 1972 being brought to my home by Mr. Harvey Wish. I indicated at that time that I did not recall that. I have since had a chance to, again, consult with counsel, and a parcel was brought to my house at that time by Mr. Harvey Wish. You also questioned me at that time about a telephone conversation. I believe it was of October 6, 1972. A phone call was by Mr. Harvey Wish and you indicated that there was a reading of a portion for an application for a leave to appeal. That is also correct.

I wish to correct my recollection as I stated to it two days ago. You indicated at that time of October 13 that there had been a package taken from the office of Harvey Wish. I don't specifically recall it, but it probably is true. You mentioned, again, at a later time of a telephone call on October 19, 1972, wherein I ordered to call the office of Mr. Harvey Wish to inform or leave a message with his secretary that the leave to appeal was granted. That is correct.

Mr. Ozer, on the advice of counsel, I will at this time refuse to answer any further questions on the ground that my answers would tend to incriminate me and to avail myself to the protections of the Fifth Amendment.

Q. Is it your intention to refuse to answer any questions no (5) matter what the subject matter?

A. On the advice of counsel, Mr. Ozer, I have been informed and advised that I should not answer any further questions on any subject matter because the answers might tend to incriminate me.

Q. I want you to give some careful thought to your response in that regard, Justice Swainson. You have been questioned in some very considerable detail concerning the handling of the Whalen appeal by the Supreme Court and your participation in it. You have at this point acknowledged, at the very least, the incorrectness of certain answers you gave before this Grand Jury and which had been previously incorrectly given under oath to Special Agents of the Internal Revenue S rvice. I have no particular difficulty accepting your assertions of the Fifth Amendment privilege further, with respect to all matters concerning the Whalen appeal.

There are other matters, other cases handled by the Supreme Court, other cases involved in the appellate judicial system of the state not handled by the Supreme Court about which I will propose to question you. Is it

your intention to assert the Fifth Amendment privilege as to all of the other matters?

A. On advice of counsel, Mr. Ozer, I intend not to answer any further questions on any further matters under my Fifth (6) Amendment privilege.

Q. All right. Justice Swainson, you are excused.

A. Thank you.

(Whereupon the witness was excused).

Certification

I, Denise A. Mosby, Notary Public in and for the County of Wayne, State of Michigan, do hereby certify that I have recorded stenographically the proceedings had and testimony taken in the above-entitled matter before the Grand Jury, and that the foregoing transcript, consisting of six (6) typewritten pages, is a true and correct transcript of the proceedings.

/s/ Denise A. Mosby
Court Reporter
State of Michigan, County of Wayne

Supreme Court, U. S.
FILED
MAY 20 1977
MICHAEL RODAK, JR., CLERK

No. 76-1177

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN B. SWAINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,

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UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 34-46) is reported at 548 F. 2d 657. The order of the district court (Pet. App. 25-31) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1977. The petition for a writ of certiorari was filed on February 25, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1623 is the exclusive perjury statute applicable to perjury before grand juries.

2. Whether the preaccusation delay in this case violated the Due Process Clause.

3. Whether conversations between two of petitioner's co-conspirators were properly admitted into evidence under the co-conspirator exception to the hearsay rule.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on three counts of perjury, in violation of 18 U.S.C. 1621.[1] He was sentenced to concurrent terms of one year and one day's imprisonment, all but 60 days of which were suspended in favor of unsupervised probation. The court of appeals affirmed.

In 1972, while petitioner was an associate justice of the Supreme Court of Michigan, an intermediate appellate court of Michigan affirmed the conviction of John Whalen for breaking and entering and for larceny. In October 1972, following denials of Whalen's application for leave to appeal and a motion for reconsideration, the Supreme Court of Michigan, at petitioner's instigation, took the extraordinary action of granting Whalen leave to appeal *sua sponte* (App. 138a-139a).[2] On November 16, 1972, a commissioner's recommendation that Whalen's application for bail be denied was held by petitioner for a court conference. On December 21, at petitioner's initiative, bail was granted (App. 145a-148a). Whalen's appeal was argued on October 3, 1973, and on December 18, 1973, the court reversed his conviction and remanded

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[1]At the close of the evidence, the trial court granted petitioner's motion for judgments of acquittal on three counts charging him with use of a facility in interstate commerce to commit bribery and with mail fraud. The jury acquitted petitioner of conspiracy. Petitioner was tried with Harvey Wish, who was acquitted of charges of bribery and mail fraud and convicted of conspiracy (Pet. App. 35).

[2]"App." refers to the two-volume appendix filed by petitioner in the court of appeals.

the case for a new trial. *People* v. *Whalen*, 390 Mich. 672, 213 N.W. 2d 116.

On May 19 and 21, 1975, petitioner appeared before a federal grand jury in the Eastern District of Michigan. The grand jury was investigating allegations that petitioner had accepted a $20,000 bribe from Harvey Wish, a bail bondsman, for his efforts in behalf of Whalen, one of Wish's clients.

On May 19 petitioner testified before the grand jury (1) that he had not discussed Whalen's case with Wish in a telephone conversation on October 6, 1972, or at any other time (App. 48a); (2) that he did not telephone Wish's office on October 19, 1972, and leave a message to the effect that leave for an appeal in Whalen's case had been granted (App. 39a-40a); and (3) that he did not receive a television set or a large carton from Wish on October 15, 1973 (App. 50a). The Assistant United States Attorney then read to petitioner transcripts of the testimony of eyewitnesses to petitioner's receipt of the television set. Petitioner declined to testify further, and the grand jury was recessed.

In his second appearance before the grand jury on May 21, 1975, petitioner admitted (1) that on October 6, 1972, he had spoken with Wish by telephone and that Wish had read him a portion of Whalen's application for leave to appeal; (2) that he had telephoned Wish's office on October 19, 1972, and left a message that Whalen had been granted leave to appeal; and (3) that on October 15, 1973, a large box had been transferred from Wish's car to petitioner's car (App. 61a-62a).

The indictment charged that petitioner's testimony of May 19 was false. At trial petitioner's admissions of May 21 were corroborated by other evidence. On October 6, 1972, in a tape-recorded telephone conversation

between Wish and Whalen, who was then acting as an informant, Wish said (App. 343a-344a): "I read it, he says well I'm going to present it," and "[i]n other words I said it will be presented to the Supreme Court of Michigan on Monday, October 17th." On October 20, 1972, the following exchange between Wish and Whalen was recorded (App. 408a):

> Wish: This is the message he left here yesterday. It is done
>
> Whalen: Beautiful
>
> Wish: Yeah
>
> Wish: An order granting leave to appeal will be entered today. Now he called here this morning * * *.

Petitioner's receipt of the television set on October 15, 1973, was shown by the testimony of a restaurant parking lot attendant who said that on that date, at petitioner's request, he transferred a large box marked "television" from another car to petitioner's car (App. 487a-488a). An agent of the Federal Bureau of Investigation also testified that he observed the box being placed in petitioner's car (App. 469a-471a).

ARGUMENT

1. The general perjury statute under which petitioner was prosecuted, 18 U.S.C. 1621, does not establish recantation as a defense. Another perjury statute, 18 U.S.C. 1623, applicable to false declarations before any federal court or grand jury, provides that when, in the same continuous grand jury proceeding, a person admits a declaration to be false, "such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not

become manifest that such falsity has been or will be exposed." Petitioner's basic contention is that by being prosecuted under Section 1621 he was improperly denied the benefit of this recantation provision of Section 1623.

The foundation of petitioner's argument is that Section 1623, which is addressed explicitly to judicial declarations, should be held to have repealed Section 1621 by implication. But repeals by implication are not favored; whether there has been such a repeal is primarily a question of congressional intent, and petitioner has not pointed to any legislative history of Section 1623 demonstrating an intent to displace Section 1621.[3] Petitioner concedes that the question presented here is one of first impression (Pet. 10), and the only appellate court that has considered the matter has indicated that it would not be inclined to find that Section 1623 is the only statute punishing grand jury perjury. *United States* v. *Kahn*, 472 F. 2d 272 (C.A. 2), certiorari denied, 411 U.S. 982.

Section 1623 was enacted principally in order to remove certain constraints that impeded perjury prosecutions under Section 1621. Thus, Section 1623(c) permits conviction simply upon a showing that the defendant made inconsistent sworn statements in court or grand jury proceedings, without requiring the prosecution to show which of the declarations is false; and Section 1623(e) eliminates the requirement, read into Section 1621 by judicial construction, that perjury be shown by the testimony of at least two witnesses. Although petitioner was denied the benefits of any recantation defense that might have existed,

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[3]Section 1623 was part of the Organized Crime Control Act of 1970. The 1970 statute thoroughly examined the relationship between its new provisions and existing criminal statutes, and numerous of its provisions were expressly stated to repeal or modify earlier statutes. See Pub. L. 91-452, 84 Stat. 922. Congress did not modify Section 1621, and in context the omission is pointed.

he received the benefits extended by Section 1621: the requirement of proof of falsity and the protection of the "two-witness" rule. See Pet. App. 40.

In any event, the recantation defense of Section 1623 would not have assisted petitioner. The recantation provision is addressed to the court and not to the jury (*United States* v. *Kahn, supra,* 472 F. 2d at 283 n. 9), and in the circumstances of this case the district court would have been required to find, as the court of appeals did, that petitioner recanted only after his perjury had been exposed (Pet. App. 43):

> [I]t is clear from the record that §1623(d) would not have precluded prosecution of [petitioner] for perjury. When [petitioner] made admissions concerning his conversations and transactions with Harvey Wish it had become "manifest that such falsity" had been exposed. His changed testimony came after he had heard transcripts of the testimony of two eyewitnesses to a previous transaction which he had categorically denied in his earlier testimony.

Petitioner acknowledges (Pet. 11) that this is a "difficult hurdle" to overcome. It is more than difficult. It is insuperable.

Finally, we point out, as did the court of appeals (Pet. App. 42-43), that petitioner did not raise prior to trial any objection to proceeding under Section 1621 rather than Section 1623. He consequently may not raise the contention belatedly. Fed. R. Crim. P. 12(f); cf. *Davis* v. *United States,* 411 U.S. 233.

2. Petitioner's contention (Pet. 13-18) that unconstitutional preaccusation delay took place in this case is insubstantial. Petitioner measures the delay by the lapse between October 1972, when the Supreme Court of Michigan granted Whalen leave to appeal, and July 1975, when

he was indicted. But whatever merit this argument might have had if petitioner had been convicted of a substantive offense, he was not so convicted. He was convicted only of perjury. The perjury took place on May 19, 1975, the indictment followed on July 3, 1975, and the trial began on October 20, 1975. The preaccusation delay was less than two months.[4]

3. Petitioner objects to the admission under Fed. R. Evid. 801(d)(2) of tape recordings of conversations between Wish and Whalen. Petitioner's arguments are unpersuasive. The longstanding federal rule permitting the admission of statements made by co-conspirators in the course of a conspiracy does not violate the Confrontation Clause (see *Dutton* v. *Evans,* 400 U.S. 74, 80-82; *United States* v. *Shaffer,* 520 F. 2d 1369 (C.A. 3), certiorari denied *sub nom. Vespe* v. *United States,* 423 U.S. 1051), and the tape recordings at issue here fell within that exception.

There was ample non-hearsay evidence to link petitioner to a conspiracy with Whalen and Wish. The evidence

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[4]There is no need to hold this case pending the Court's disposition of *United States* v. *Lovasco,* No. 75-1844, argued March 21 and 22, 1977. In *Lovasco* there was a delay of 18 months between the offense and the indictment (compared to six weeks in this case). The district court and court of appeals found the delay to be unreasonable, and the question presented to this Court was whether, in such circumstances, a defendant must show both prejudice because of the delay and that the prosecution delayed intentionally for the purpose of obtaining a tactical advantage in order to secure a dismissal of the indictment. Petitioner has shown neither unreasonable delay, invidious motivation, nor prejudice. Petitioner's only claim of prejudice has to do with the death of the former Chief Justice of the Supreme Court of Michigan. As the court of appeals explained, however, the Chief Justice's testimony would have pertained only to the substantive counts (Pet. App. 44). Moreover, petitioner has not alleged that the delay between May 19 and July 3, 1975, was designed to, or did, achieve a tactical advantage.

showed that petitioner was responsible for the *sua sponte* grant of leave for an appeal in Whalen's case, as well as for the granting of bail. He admitted that he had discussed Whalen's case with Wish on at least two occasions. This evidence was enough to allow the conspiracy charge to be presented to the jury, and it was therefore sufficient, under any standard, to allow the admission of hearsay statements by co-conspirators.

Petitioner contends that Whalen was not a co-conspirator because he had been acting as an informant (Pet. 21-23). But Whalen's role as an informant could not have affected Wish's status as a co-conspirator. That still would have left a two-person conspiracy. Moreover, it was Wish's side of the conversations that damaged petitioner, since it was Wish who was carrying out the bribery scheme.[5]

Petitioner also contends that some of the conversations occurred after the conspiracy had terminated (Pet. 23-24). In procuring leave for an appeal and bail, however, the conspirators had accomplished only part of their objective. An appeal would have been of little benefit to Whalen if his conviction had not been reversed. The conspiracy therefore continued at least until October 1973, when Whalen's case was argued. The only later conversation admitted into evidence was a January 10, 1974, discussion between Wish and Whalen (App. 474a-477a) about the effect of the reversal of Whalen's conviction and whether the State would retry him. The conversation did not add

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[5]The evidence showed, moreover, that Whalen went to the F.B.I. following his first conversation with Wish about the bribery scheme (App. 508a). Thus, the record supports a finding that Whalen became an informant after he had become a conspirator. The fact that Whalen became an informant during the course of the conspiracy did not render Wish's statements inadmissible. See *United States* v. *DeSapio*, 435 F. 2d 272, 282 (C.A. 2), certiorari denied, 402 U.S. 999.

anything to the evidence of petitioner's involvement in the bribery scheme. Even if erroneous, its admission was harmless error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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*The Solicitor General is disqualified in this case.